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To Promote the Efficient Administration of Justice

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Respect for the law is not engendered in this enlightened day by fulsome phrases regarding the common law and the constitution; the only method by which such respect can be maintained is by making the law itself worthy of respect.

—Prof. Orrin K. McMurray.

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American Judicature Society

Editorial

This number of the JOURNAL is devoted to two subjects of the greatest significance to judicial reform—conciliation procedure and informal procedure in small causes.

The readers' attention is called at the start to the fact that these are two distinct subjects, and not two phases of a single subject. It may be well to attempt definitions to prevent confusion in the use of terms.

CONCILIATION PROCEDURE involves submission of a controversy by the parties in person, and without attorneys, to a special tribunal or commission; the hearing is private and procedure is entirely informal; the parties tell their stories and the conciliation judge or commissioner advises them of their respective rights and urges them to agree upon an equitable settlement; if an agreement is made it is entered as a judgment; except in disputes of an exceptional nature no claimant will be permitted to begin an action in a court of law until he has received a certificate showing that there has been an attempt at conciliation. Such procedure is adapted to controversies involving large amounts as well as small.

INFORMAL PROCEDURE in small claims causes implies summary trial before a judge who dispenses with all needless etiquette but makes a finding of facts and awards a judgment in accordance with the law and the facts. The court is public and the parties are permitted to have attorneys if they so wish.

Conciliation procedure had its origin over a century ago in Norway and Denmark when these countries had one sovereign. It met with immediate success and remains today, after numerous political and social changes, the cornerstone of the structure of judicial procedure in both nations and a cherished social institution.

We present an excellent description of modern conciliation procedure in Norway in our first article, and supplement it with a brief statement of conciliation procedure under the new judicial code which took effect in Denmark in 1916.

The North Dakota legislature in 1893 endeavored to transplant the system to American soil, but the experiment was crude and the result abortive. The act permitted a party to send another to represent him at a hearing. This was a fatal defect. It also required the conciliation commissioners to function within a regular justice of the peace court. This subjected the plan to the competition of a horde of petty politicians entrenched in an office which was dependent upon fees. It was absurd to subject conciliation procedure to the influence of officials who made their living through adversary litigation, and who were closely affiliated with the pettifogging element of the legal profession. In 1895 the statute was amended so that the consent of both parties was requisite before the conciliators could be called in, and that put an end to its limited usefulness.

Then came a long period during which the evils of expensive procedure were linked with the faulty organization of our inferior courts and the situation grew steadily worse for small claimants throughout the land. The creation of the "organized" municipal court, related in the JOURNAL for February, 1918, furnished at last a favorable environment for experiment, and in March, 1913, the Municipal Court of Cleveland opened a branch for the summary adjudication of claims involving not more than \$35. This branch was named the Conciliation branch court.

It was not, in fact, a court at all. A judge was assigned to act as mediator in these small causes and to effect a settlement in an extra-judicial way. The branch had no compulsory process and its judgments rested wholly upon agreement of the parties. But it filled the bill perfectly within the scope intended. Defendants always appear in response to notice. The proceedings are private. An agreement is always reached. There are no appeals.

The substantial success of the experiment brought the word "conciliation" again before the American public, but with a new connotation, for it became associated with the expeditious trial of small claims. In the creation of the Small Claims branch of the Municipal Court of Chicago in March, 1915, the distinction between conciliation proper and mere informal procedure was observed. In this court the accustomed elements of contentious procedure are retained, but the procedure is stripped of all non-essentials. The hearings are public and counsel are admitted. There is first a finding of facts and then formal judgment. It is related in the article in this number how this experiment began with a jurisdictional limit of \$35, and how it has since been thrice raised until now, with a limit of \$200, this branch is giving speedy and inexpensive disposal of more than 25,000 causes every year.

The article on the Conciliation Court of Minneapolis tells instructively of further experiment in which the principles of conciliation and informal procedure are woven together. The statute provides for conciliation procedure to the limit of jurisdiction of the Municipal Court of Minneapolis, \$1,000, at the option of the plaintiff. If the claim is for \$50 or less and the parties fail to reach an agreement, the judge shall proceed forthwith to render a binding judgment, subject to retrial under certain conditions. It is interesting to note that the new branch has been eminently successful with respect to small claims but is making little progress in effecting con-

ciliation in causes involving more than \$50. This is because resort to the Conciliation branch is optional. To be really effective the attempt at conciliation should be made a condition precedent to beginning proceedings in any regular branch.

The conciliation court supplies the need for a neutral ground where parties to a dispute may unbosom themselves with entire confidence that their secrets will not be disclosed and that they will never forfeit any substantial right by telling all the truth. It admirably suits the needs of the claimant who wishes nothing more than is in justice due him. But there will be cases in which both parties are disposed to be fair and save costs of litigation, and yet are quite unable to agree as to their respective rights. For them it should be possible to submit their controversy to a decision at the hands of the conciliation judge forthwith. The modern Norwegian practice permits such arbitration before the conciliators.

These ideas were also worked out in the conciliation and arbitration rules of the Municipal Court of New York, dealt with separately in this number. Up to the full jurisdiction of the court the parties may obtain informal procedure in this court by stipulating for an arbitration before a judge, or any other person. Or the plaintiff may invoke the conciliation powers of the court but attendance by the defendant is optional and no binding judgment can be entered.

With this introduction let us present the data which has been gathered and reserve comment upon it for the final article, entitled "In Conclusion."

It seems to me a great truth that human beings cannot stand on selfishness, mechanical utilities, economies and law courts; that if there be not a religious element in the relations of men, such relations are miserable and doomed to ruin.

—Carlyle.

Norway's Conciliation Tribunals

The following account of conciliation procedure in Norway is taken from an article in the *Atlantic Monthly*, vol. 68, entitled "Courts of Conciliation," written by Nicolay Grevstad. The author's introductory statements are omitted for the sake of brevity.

To relieve the courts of this drudgery, without depriving the people of their rights to obtain legal redress for legal wrongs, be they ever so insignificant, is the object of the Court of Conciliation in Norway and Denmark. It has served the purpose so well that it has become the most popular tribunal in each country. The following is a reasonably full outline of the main features of this institution as it exists in Norway:

Every city, village containing at least twenty families, and every parish constitutes a separate "district of conciliation." The districts are small in order to make it easy as possible to attend court, as personal attendance is the main feature of the proceedings. The court or commission, as the statute styles it, is made up of two members. One of these acts as chairman and clerk. These officials are chosen for a term of three years, at a special election by the voters of the district, from among three men nominated by the city or parish council. Only men above twenty-five years of age are eligible and the laws expressly provide that only "good men" may be placed in nomination. The court meets at a certain place, day, and hour, every week in the cities and every month in the country districts. It is not public. The proceedings are carried on with closed doors, and the commissioners are bound to secrecy. Nothing of what transpires is permitted to reach the outside world. Admissions or concessions made by one party cannot be used against him by his adversary should the case come into trial in the regular court, but the party willing to settle before the commis-

sioners is entitled to their certificate to that effect.

The Court of Conciliation has jurisdiction in all civil or private cases. Appearance before the commissioners is compulsory in all such cases, and the first step in a proceeding. The law court will dismiss, *ex officio*, every case of this class that does not come up from the Court of Conciliation with a certificate of the commissioners attesting that an effort at a conciliation of the parties has been duly made before them. In cases coming under the jurisdiction of police, admiralty, military and ecclesiastical courts and in a few others, appearance before the Board of Conciliation is not compulsory. In such instances a process of conciliation is the first step in the law court; but it is merely an empty formality. The mode of procedure in the peace court is as simple as it could possibly be. The plaintiff states his case in writing, reciting in plain everyday language the facts upon which he bases his complaint, and what he wants the defendant to do or refrain from doing, and requesting that the latter be cited to meet the plaintiff in the Court of Conciliation to try to reach an agreement in the manner prescribed by law. The senior commissioner writes the court's summons upon the complaint, citing both parties to appear at its next or second sitting, as the case may be. A fee of twenty-five cents is charged for issuing the summons, to which is added fifty cents in the event a conciliation is effected. These comprise all the costs in the court, and also all that this court costs. The commissioners receive no other compensation than these small fees. The litigants must appear in person, except in case of sickness or very pressing business engagements, when the use of a representative is allowed, providing, however, that he is not a practicing attorney. Lawyers are rigidly excluded from the Courts of Conciliation, except,

of course, when they attend in their own behalf. If a party fail to appear in person without good excuse, he will be adjudged to pay the costs in the law court even if he should win the case. This rigid rule was designed to induce personal attendance and in practice has shown itself very effective. Either party may submit documentary evidence and if the facts in a case are entangled with essential points in controversy, a continuation may be granted with the consent of both parties. Rules and forms, however, play only a secondary part. The character and object of the court make it pre-eminently a forum of common sense unfettered by legal fictions and technicalities. The judges or commissioners discourage any attempt at legal wrangling by either party. They are selected with a particular view to their fitness as peacemakers. While not "learned in the law," in the technical sense of the term, they have, nevertheless, a fair understanding of the fundamental principles of municipal law and a keen sense of equity and material justice. The people regard the office as one of honor and trust rather than of emoluments and have always kept in view that in order to serve its purpose the high, non-partisan character of the institution must be maintained. In judging of the fitness of candidates they are far more exacting than the statute—not satisfied with merely "good men," as the law requires, they pick the very best men in the community; men of mature years who have earned a reputation for intelligence, conservatism and fairness in their dealings with their fellow men. The office has been kept out of politics. Not even in times of great political excitement, when party lines were rigidly drawn and the regular courts were suspected of not being entirely free from political bias, has there been any complaint against these popular tribunals on this account. On entering upon their duties the judges are sworn honestly and faithfully to strive to reconcile contestants appearing before them, according to their conscience and to their best judgment, on terms that are just and

equitable to both parties and in harmony with the spirit of the law of the land. They are not required to be strict constructionists—whenever a technical construction, in their judgment, would be inequitable to either of the litigants and obstruct an agreement, they will sacrifice the letter to the spirit of the law in their advice to the parties. The very atmosphere of the lowly courtroom has a softening effect on those who enter it armed for a contest of legal rights. The judges are personally known to them and perhaps their friends, and are recognized as men in whose impartiality and integrity they can have implicit confidence. Even the humblest citizen feels that in this forum he treads upon firm and familiar ground. There are no intricate formalities to becloud the issue, no array of lawyers to confuse him, no crowd of curiosity seekers to gloat over his discomfitures. The judges and the contestants are the only ones present. Everything induces to an open, frank and dispassionate discussion of the points at issue. Each party looks upon the commissioners as disinterested, trustworthy and friendly counselors, who will give him such advice as will subserve his best interests—he has no overzealous counselor to play upon his prejudices or instincts of cupidity, or to arouse and nourish within his breast a false sense of pride. The situation is a powerful appeal to his better nature and unbiased judgment. He is perfectly free from any legal restraints as propositions or concessions which he may make in order to facilitate an adjustment will not prejudice his case if he should go to court. On the contrary, a conciliatory spirit will count in his favor in deciding the question of costs in the courts of law.

Any one in the least familiar with lawsuits knows that a large number of cases originate in trifling or imaginary wrongs. That is true not only of personal injury cases, but also many other controversies. Most people are apt to exaggerate wrongs they have suffered and many are quick to see an intended injury in actions that are perfectly harmless, or at least not

prompted by malice. Retaliation is frequently resorted to as a means of redress, and thus the accelerating pendulum of estrangement and aggression is set in motion. A slight cause, real or imaginary, results in strained relations or even a feeling of hostility between men, and there is always a lawyer at hand on either side, who knows how to add fuel to the flame by magnifying the wrongs, and promising certain relief and revenge if he is only allowed to take the case into court. To fight the case out in court becomes not only a matter of pecuniary gain, but also of personal pride, and before they know it men who have been good neighbors, perhaps friends, find themselves involved in costly litigation about insignificant differences that might have been adjusted in a few minutes of calm, unbiased discussion. It is needless to say that in such instances both parties will lose in the end. The amount in controversy, or more, is eaten up generally in fees, and the litigants leave court out of money and often enemies for life.

The influence of the Court of Conciliation is brought to bear before a legal controversy while it is yet possible to bridge the chasm by peaceable means. The injured party has made up his mind to seek redress, but before he can rush into court, he must pass through the gates of peace. Here the contestants meet without lawyers to spur them on and obscure the issue by legal verbiage. Each tells his own story in his own language and in a plain, common-sense way. With the statements of both parties before them, the judges reduce the differences to their own proportions, emphasize the uncertainty and expensiveness of litigation, and endeavor to make plain to the contestants that each, by a comparatively insignificant concession, can have the matter adjusted at once, save a large amount in court's and lawyer's fees, and, in fact, gain more than he would obtain even if successful in court. Men generally listen willingly to this kind of talk. Their own better judgment responds to this homely logic. The controversy is

lifted out of the sphere of prejudice and bias, and each feels that reasonable and sensible concessions do not humiliate him in the estimation of his friends and neighbors. It has come to be considered more creditable to return from such a meeting as friends than to carry the matter into court. In three cases out of four the contestants conclude that "a poor settlement is better than a fat judgment." The agreement of settlement is recorded and can be enforced the same as a final judgment. Thus the institution not only prevents needless, inconsequential litigation, but also serves the purpose of furnishing speedy justice.

The controversies that are disposed of in this quick and inexpensive way are of such a nature that they ought to be adjusted without the intervention of the courts, which are thus left free to devote all their time to really important litigation. The experience in Norway is that only twenty-five per cent of all civil cases that arise involve questions that are of such importance that it is considered best by either of the parties to bring them before the district court for adjudication, while seventy-five out of every hundred cases are peaceably adjusted in the Courts of Conciliation. As already mentioned, the institution is a heritage from the absolute monarchy, the royal edicts establishing it dating back to 1797. It had its origin in the King's "fatherly solicitude for the welfare of his poor ignorant peasant subjects." "Inasmuch as it has come to our notice," says the royal preamble to his ordinance, "that peasants and other lowly good and true subjects in our dominions are incited to quarrel about trifling things by dishonest lawyers, who generally keep their clutches on their unsuspecting clients till they have robbed them of all their property, we have, in our fatherly wisdom and for the protection of our loyal subjects, evolved a reform in the law of procedure designed to abate and check this monstrous evil"—then follows the body of the ordinance establishing the new institution.

A more popular or beneficent law was never promulgated by a kingly autocrat. The new institution worked well from the start, and became popular at once with all classes of the people, excepting of course legal "shysters" and greedy pettifoggers, who found their occupation gone. The opposition of the bar ceased entirely with the weeding out of the disreputable element from the profession—to the people the reform brought not only a sorely needed remedy for a growing evil, but also a lesson in popular government. The new institution was at the same time a semi-revival of their ancient system of administering justice and a harbinger of the new era of liberty. When they had established free governments, Norway and Denmark both recast their systems of law so as to make them conform to the spirit of their constitutions. But this institution was not only left intact; it has been strengthened and perfected from time to time. In Norway it is regarded as one of the corner stones of the national system of justice, and it is not an exaggeration to say that any attempt to abolish it would provoke a revolution. The more recent Norwegian legislation on the subject has conferred larger power upon these courts, and the indications are that further steps will be taken in the same direction. In addition to their functions as conciliators, they are now empowered to arbitrate and adjudicate controversies brought before them. If the parties to a case fail to agree, they can request the commissioners to act as arbitrators in the matter, or, if the case is one for recovering a debt, it can be submitted to their decision in their capacity as judges proper.

The institution has stood the test of a century and grown stronger from year to year. Conceived in the paternal care of well-meaning absolutism, it has received the enthusiastic sanction of two nations. It is without a counterpart in the whole history of law. Legislators at all times have discouraged frivolous litigation; but nothing more simple, more symmetrical,

or more effective has ever been devised as a preventive for this evil. It is as true in law as in medical science that prevention is better than cure. While checking litigation and dispensing speedy and inexpensive justice, the Courts of Conciliation save to the people an immense amount of fees, relieve the pressure upon the regular courts, reduce the ranks of lawyers to the number actually needed for the trial of cases worth trying, prevent hasty and groundless rupture of bonds of friendship, and cultivate among the people a broad, liberal spirit of fair dealing and proper regard for the equitable rights of others.—*Nicolay Grevstad, in Atlantic Monthly.*

[NOTE: In the foregoing article Mr. Grevstad says that seventy-five per cent of the conciliation proceedings result in an agreement. In a subsequent article on the same subject, appearing in the *Atlantic Monthly*, Vol. 72, p. 671 (1893) he says:

"From the publications of the Norwegian bureau of statistics, it appears that during the year 1888—the last year for which statistics of the Civil Courts have been published—103,969 civil actions were begun in Norway. Out of this number 2,300 cases were dismissed by the Courts of Conciliation for various reasons not specified, leaving 101,669 cases to be adjusted amicably, by arbitration or by judicial decision. In 81,015 instances a conciliation was effected between the parties. As an agreement of conciliation has the force of a final judgment, more than four-fifths of all civil cases were finally disposed of without recourse to a trial of any kind in a court of law. In addition to this number 7,886 cases in which the parties failed to reach an agreement were adjudicated by the tribunals of Conciliation. Of 101,669 cases, 89,901, or nearly nine-tenths of the whole number, were thus adjusted for the most part amicably, all quickly and cheaply, with but little loss of time and money, and without severing old ties of friendship and mutual good will."]

Conciliation in Denmark

Under the Danish Judicial Code which took effect April 11, 1916, conciliation procedure is retained as a cornerstone of the judicial system. The following concise description of this procedure, as it stands after more than a century of use, is taken from an article by Axel Teisen, of the Philadelphia bar, appearing in the *Pennsylvania Law Review*, vol. 65, No. 6.

Coming now to the procedure to be followed in civil cases, we first meet the requirement that conciliation must have been tried before the action can be proceeded with.

Such attempts at conciliation must be made in all cases, except the following: In cases of counter claims; in suits brought on negotiable instruments; in cases by or against the state or its officials; in cases of great necessity (to be decided by the court); where publication of the summons has to be resorted to; when defendant is out of the country and has no known representative in the country; also in certain cases of attachment.

There is a separate conciliation committee for cases between masters and domestic servants; and in certain cases the court acts as conciliation commissioner before it hears the case judicially; also, for cases coming under the jurisdiction of the Admiralty and Commerce Court there is a separate commission of experts.

All other cases must be brought before one of the ordinary conciliation commissions, each consisting of two persons, elected in a specified manner, and each of which often has jurisdiction over several judicial districts. The parties agreeing, they may appear before any of these commissions without regard to what court will have jurisdiction of the case.

As a general rule the parties must appear in person, but when lawfully prevented, any "good man," when duly authorized, may appear for them. The former prohibition of attorneys has been left out of the new code.

All of the proceedings before the commissions are conducted behind closed

doors. When an agreement is reached, it is to be entered *in toto* on the minutes of the commission and must be signed by both parties. Whether a compromise entered into is binding in law, is decided on appeal to the court of first instance, or, if entered into before a court, to the regular court of appeal. A writ of execution may issue upon the agreement reached.

The Duty of Service

Anyone who comes into the world and goes through it with the single idea that he is going to simply take care of himself, and make what money he can for himself and his family, is not a good citizen; and any member of the profession of law with the sole thought that he is going to get some money out of it, or get fame out of it, or get power out of it, is unworthy of his profession. We have entered that profession; we have enlisted in that army, and we must be loyal; but the law is not the end. It is not a fetish; it is not a god; it is not a sacrosanct that we must look at with awe and decline to touch. It is an instrumentality, simply an institution, to bring about the greater happiness and the broader life of the world. It is an essential institution. Without law there could be no liberty; without law no civilization; without law no literature, no art, no music, no justice, nothing that makes life worth living; and it is our duty through that instrumentality, that institution—our loyalty to it—that we so mold it, as far as we can, in substance and in procedure, that it shall fulfill its purpose and make the life of the world better; bring about peace; bring about justice; bring about prosperity; and make it in the end that desirable ideal—that the law shall be such, by our efforts and our influence, that it shall be that thing that people shall do homage to; that the good citizen, however humble, however lowly, however unfortunate, shall feel its beneficence; and the bad citizen, however strong and arrogant, shall feel its power.—*Hon. Lucilius A. Emery, before Maine State Bar Association.*

Conciliation Court of Cleveland¹

To fully appreciate the purpose of the Conciliation Court of Cleveland we must look into the causes which led to its creation. A few general observations applicable to courts, followed by an outline of conditions found to exist in some of those courts, will reveal the causes. In view of these, a comparative study of some phases of the continental judiciary may be entered upon with both interest and profit in order that we may determine whether the same can be safely adapted to our own needs and conditions. I shall endeavor to show that we may appropriate some European ideas, relating to litigation; that the same have already been tried with some measure of success; that the Conciliation Court of Cleveland not only curbed a great many of the ills we formerly experienced and which still exist elsewhere but that it also proves to be a permanent success.

"The greatest question before the American people is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt despatch and the cheapening of its use." I regard this as the most significant utterance which has come from the lips of ex-President Taft during his public career. This statement, the American people, the rich and poor, the strong and the weak, the learned and the ignorant, the exploiters and the exploited, all know is true.

The specific way in which the rich man wears out his poor opponent in the courts is through the tortuous and costly process of appeal. The problem may be summed up in one sentence: We have made it altogether too easy to get into court and quite too difficult to get out of court.

In every large city there is a host of lawyers and would-be lawyers hungry and

ready for business; and, while the high-minded attorney strives to keep his client out of court and seeks to serve him with all honorable means at his command, there is a large number of those who encourage litigation and derive their fattest fees from the very entanglements into which they thrust their clients. And when you add to these lawyers the ambulance chaser, the runner, the capper, the collector and the constable, you have a veritable army lying in wait for clients and lawsuits; and, with the door to strife thrown wide open through the rivalry and competition among justices of the peace to get cases into their courts, we need not marvel that nearly forty thousand cases were annually brought into the justice courts of Cuyahoga County.

In 1905 the Legal Aid Society of Cleveland, acting through a committee of attorneys, made a careful investigation of existing evils arising out of the justice court system. A casual and cursory examination of that report will convince the reader that most of the officials of that court, including the justice of the peace himself, were unscrupulous and dishonest. It is unnecessary to dwell at any length in enumerating the many evils that exist and have existed in our justice courts. So much has been said and written concerning it that not even the selfish defenders of the system dare deny the systematic plunder practiced by official vultures under the guise of law. So far as Cleveland and other large cities are concerned, we have come to regard the country justice of the peace and his fellow workers as nothing less than a public menace which had to be resisted with grim determination. At least fifty per cent of the cases handled by our justices of the peace should never have reached the stage of litigation. If the justices had been men of peace, honest, true and just arbitrators, more than half of that number of cases could have been settled through their friendly inter-

¹An address delivered before The American Political Science Association at Chicago, December 30, 1914. The author was a judge of the Municipal Court of Cleveland during the period covered by this paper. On January 1, 1915, he took his place as judge of the Common Pleas Court of Cuyahoga County, Ohio, in which the city of Cleveland is situated.

vention. But peace amongst the litigants meant no fee to the justice of the peace and the vampires surrounding him. Strife, contention and litigation were productive of lucrative income for all the servants of justice. Much of the criticism applied to the administration of justice in other courts may be traced to the following sources:

- (1) Lack of understanding; ignorance on the part of the people as to the function of the court; failure on the part of the judge to know or recognize the needs of the people.
- (2) Wasteful, lengthy, cumbersome and out-of-date procedure.
- (3) Heavy and burdensome court costs.

We very frequently hear the question asked: Is the presiding judge merely an umpire who enforces the rules in a legal contest and decides the same upon the information brought to him or is it his business to see that justice is done as between the parties? In other words, is it desirable that the judge shall be invested with some degree of initiative to investigate, to inquire into and to search for the truth regardless of what information the lawyers or litigants may bring. The conservative lawyer naturally inclines to the view that the judge is merely an umpire. He looks with apprehension upon any attempt at initiative on the part of a judge. He couches his objection in the fear that unless we limit the judge to his time-honored sphere, the basic principles of strict impartiality in the courts will never be conserved, the judge will overstep his bounds and the whole structure of our judicial system will be endangered. On the other hand, the average man fails to see the usefulness of our courts as they are now constituted. He cannot reconcile himself to a system which requires the employment of a lawyer—a middleman—even in the simplest matters. He, therefore, demands the elimination of the middle man, whenever possible, and desires direct contact with his judge. He wants to look upon the judge as a pro-

tector of his rights rather than one with judicial dignity presides over a legal game. One thing is certain: we cannot even hope to render justice without first having a clear conception as to what justice means. There are many classical definitions, but it took a commercial age to discover that in the main it is merely a problem of correct bookkeeping. We have come to realize, in both the criminal as well as the civil work of the courts, that justice is the art or science of obtaining human or social balances.

Permit me, at this point, to direct your attention to an institution unknown in this country or England but which has been in existence for over a century in Norway and Denmark. I refer to their courts of conciliation which present a sharp contrast to our justice courts. A comparative study of the two will prove illuminative:

In the years 1795 and 1797 respectively when Norway and Denmark were absolute monarchies we find the following preamble to a royal edict:

"Inasmuch as it has come to our notice that peasants and other loyal, good and true subjects in our dominion, are incited to quarrel about trifling things by dishonest lawyers who generally get their clutches on their unsuspecting clients till they have robbed them of their property, we have, in our fatherly wisdom and for the protection of our loyal subjects, evolved a reform of the law of procedure designed to abate and check the monstrous evil."

Then follows the body of the ordinance establishing the Court of Conciliation.

The main features of the institution as it exists today in both those countries are the following: Every city and village containing at least sixty families constitutes a separate district of conciliation. The districts are small, in order to make it as easy as possible for the parties to attend the courts in person, as personal attendance is the main feature of the proceedings. The court, or commission, as the statute styles it, is made up of two mem-

bers, one of whom acts as chairman and clerk respectively. These officials are chosen for a term of three years at a special election by the voters of the district. Only men at least twenty-five years of age are eligible; and the law expressly provides that only "good" men may be nominated and elected. The court meets at a certain place, day and hour, every week in the cities and every month in the country districts. The proceedings are carried on behind closed doors and the commissioners are bound to secrecy. Nothing is permitted to reach the outside world. Admissions or concessions made by one party cannot be used against him by his adversary, if the case should come to trial in the regular courts; but a party wishing to settle his differences before the commissioners is entitled to their certificate to that effect. The Court of Conciliation has jurisdiction in all civil cases. Appearances before the commissioner is the first step in every legal proceeding. The law court will dismiss every case that does not come to it from the Court of Conciliation, with a certificate of the commissioners attesting that an effort at conciliation of the parties has been duly made before them. The method of procedure before the peace court is simple; the plaintiff states his case in writing, reciting in plain, everyday language the facts upon which he bases his complaint and requesting that the defendant be cited to meet the plaintiff in the Court of Conciliation, in order to reach an agreement in the manner prescribed by law. The senior commissioner writes the court's summons upon the complaint, citing both parties to appear. A fee of twenty-five cents is charged for issuing the summons, to which is added fifty cents in the event a conciliation is effected. The commissioners receive no other compensation.

Litigants must appear in person except in case of sickness or very pressing business engagements, when the use of a representative is allowed, provided, however, that such representative is not a practicing attorney. Lawyers are rigidly

excluded from the courts of conciliation, except, of course, when they attend in their own behalf. If a party fails to appear in person, without a good excuse, he will be adjudged to pay the costs in the law court, even if he should win the case. Each party tells his own story in his own language. With a statement of both parties before them, the judges reduce the differences to their true proportion; and, by emphasizing the expense of litigation, endeavors to make it plain to the contestants that each, can have the matter adjusted at once, save a large amount of court and lawyers' fees, and, in fact, can save more than he would obtain even if successful in the law courts. In three cases out of four the parties conclude that a poor settlement is better than a fat-judgment. The agreement of settlement is then recorded and has the force and effect of a final judgment. Seventy-five per cent of the cases arising in Norway are peaceably adjusted in the Courts of Conciliation; while in Denmark the percentage is increased to ninety. When Norway and Denmark established free governments, they recast their systems of law so as to make them conform to the spirit of their constitution; but the Court of Conciliation was not only left intact but it has been very greatly strengthened and perfected from time to time. The institution has stood the test of a century and has grown stronger from year to year.²

In the light of our experience with our courts, there is no reason why the idea of conciliation could not be adapted successfully to the needs and conditions of American institutions.

In 1904 the first experiment in conciliation was tried in the police prosecutors' office of Cleveland. The manner of handling offenses, such as technical violations of state laws and city ordinances first came under observation. The policeman either made an arrest when he witnessed a violation of law or he served a warrant sworn to by himself or some one else. This

²See Axel Teisen's description of conciliation procedure under the Danish Code of 1916, p. 8.

was followed by taking the prisoner to the nearest police station, and then, after searching him, he was placed behind prison bars in close proximity to other persons who were either diseased or dangerously criminal. There he would remain over night, in the absence of bail, until some judge passed upon his case. It was not an infrequent occurrence to see teamsters charged with a technical violation of some traffic regulation brought into court through the jail door, while prisoners charged with serious crimes, such as burglary, robbery and grand larceny, were far more privileged, they having secured bail immediately following their arrest. Dozens of young boys were often kept in jail over night, for a violation of the sidewalk ordinance, in a very unwholesome and undesirable environment. The judge usually disposed of those cases by the imposition of a fine which had to be paid or the prisoner was obliged to serve time in the workhouse at the rate of sixty cents a day, while the real and inveterate criminal often escaped by the payment of a fine. Thus the law and the courts have become hateful to many thousands of people who received their first glimpse of both on the commission of their first offense and their consequent experience with the courts. Unscrupulous professional bondsmen, dishonest lawyers, their business drummers, political wire pullers and other vultures were often successful in exacting heavy tolls for promised or real intervention. When the Municipal Court Act was framed, provision was made for the litigant who was unable to secure the services of a lawyer. A deputy clerk was delegated to assist parties in preparing and filing papers incident to their suit and to advise and assist, whenever possible, in bringing about the settlement of cases involving small amounts of money. The judges selected for this important post a man with legal training, long experience in court business and a temperament suited to the exacting requirements of the work.

During the year 1912 twelve hundred cases were settled out of court. No record

was made of the cases in which advice and assistance were given. No doubt, the number was very large but the services in this department were free. The work thus begun led to the formation of the Conciliation Branch of the court. The object was not only to relieve the court of much petty litigation but to provide a simple and inexpensive means for the settlement of minor civil suits—cases which had formerly made up the chief business of a justice shop and the shyster lawyer.

The wide powers conferred upon the Municipal Court enabled the judges to establish this branch without any legislative enactment—merely by a rule of the court. All claims under \$35.00; all cases of attachment and garnishment, involving less than \$35.00, and all cases of replevin are entered upon the conciliation docket. The defendant is then notified by mail of the claim and of the day set for the hearing of the case. [It may be of interest in this connection to state that all writs of the Municipal Court of Cleveland are served by mail instead of by the old and expensive method of personal service by constables. Uncle Sam usurps the functions of the constable.]

The Conciliation Branch of the Municipal Court of Cleveland opened for business on March 15th, 1913. One of the judges of the court was assigned to the conciliation branch. The parties to the lawsuit come before the judge; lawyers are not encouraged to represent the parties and no set procedure is required. The judge, by question and suggestion, seeks to elicit the point at issue. While no controversy is permitted to be drawn out at length, each party is allowed to state his case in his own way. When the essential facts are brought out, the judge seeks to effect an amicable adjustment of the differences between the parties to the suit. A few illustrations will indicate the character of the work:

(1) Mrs. D. kept a boarding and lodging house; Mr. G. was one of the lodgers. Mrs. D. claims \$10.00 for damage to a mattress. She complained that on various

occasions she had warned the young man not to smoke cigarettes while in bed, but, contrary to her warning on the evening of Memorial day he provided himself with several packages of cigarettes, crawled into bed with his boots on and smoked away; that just as she feared, the mattress caught fire and was totally damaged and destroyed. The defendant admitted his fault but maintained that the landlady wanted too much money for the old mattress. Instead of calling witnesses to testify as to the value of the mattress, the judge called the manager of a wholesale mattress concern by telephone, gave him a full and complete description of the mattress and asked for the price. The judge was informed that the same could be had for \$2.50. The young man gladly paid that amount to the woman who immediately proceeded with a note from the judge to the manager of the mattress concern and received a brand new mattress for \$2.50.

(2) Mrs. A. is a widow and mother of three children. Mr. B. is a grocery man. He came to court demanding an immediate garnishment of Mrs. A.'s wages on a claim for necessities, in the sum of \$19.00. Her wages were \$7.00 per week. Instead of issuing such garnishment, the grocery man was persuaded to have his matter disposed of in the Conciliation Court. Both parties appeared at the appointed hour. It was subsequently disclosed that owing to sickness of one of the children, the widow ran short of money but that she was perfectly willing to pay all that she could. An agreement was entered into between the parties whereby the grocery man was to receive \$2.00 per month. Both parties left the court room quite satisfied.

(3) Miss G., a servant, sued a Mrs. C. for a week's wages, amounting to \$9.00. Mrs. C. had wrongfully discharged Miss G. before the week was up. She was willing to pay the servant for the actual time but no more. The cause of the discharge, it appeared, was due to a failure on the part of the servant to follow instructions. Mrs. C. instructed her that in order to

eliminate the noise of her squeaky shoes, she would be obliged to walk on her toes while waiting on the table. The servant claimed that she did her best to follow out the instructions of her mistress for several days but that she found it impossible to continue that way on account of the swollen condition of her limbs. When Mrs. C. was told that failure to follow such instructions was not good cause for a discharge of the servant, she seemed surprised but a few minutes' talk convinced her of her foolhardiness and she gladly paid the bill.

(4) Here is an instance of greater importance and involving a much larger amount of money. Mr. S., a young man of twenty-two, brought suit against Mrs. F. for \$1,000.00. Both were represented by counsel. In his statement of claim, drawn by his attorney, the young man complained that on several occasions the defendant called him a thief; that she told the neighbors that he was a thief and that he stole her money; that because of that his reputation was injured and he estimated his damage in the sum of \$1,000.00. Mrs. F. answered by a general denial. There was a veritable army of witnesses waiting to testify on the one side or the other. Both sides were waiting for stenographers. The battle array was drawn up and they were ready to fight the case to the last ditch. After some inquiry on the part of the judge, it appeared that the plaintiff had two hundred dollars in a savings bank which he had saved during seven years of hard work; that the defendant had a small home heavily mortgaged on which she was paying monthly installments. Instead of allowing the case to proceed in the usual manner, the judge asked the defendant if it was true she said the young man was a thief and that he stole her money. She emphatically denied this. A statement was then drawn up by the judge reading as follows:

"I, the defendant, in this case, declare in open court that I never said that the young man was a thief or that he stole my money. In my opinion he is an

honest and industrious young man."

She gladly signed it and the judge signed and attached the seal of the court to it. When the same statement was submitted to the plaintiff, he clapped his hands with glee and exclaimed: "That's fine; I got my reputation back." The whole proceeding took five minutes. All the parties involved, including the witnesses, were very happy at the disposition of the case—all except the lawyers. It was reported by the elevator man that what the lawyers said about the judge could not be safely repeated in polite company or in the presence of ladies.

Up to date nearly 7,300 cases were disposed of in the Conciliation Branch of the Municipal Court. It took only two forenoons of each week on the part of one judge to handle these cases.

The cost to the litigants was between 25 and 55 cents in each case.

The success obtained in the conciliation work of the court will undoubtedly lead to an extension of the principle in matters of greater importance and involving larger amounts. The Legal Aid Society of Cleveland has a bill drawn, ready to be introduced at the next session of the General Assembly of Ohio, which will provide that in all cases where a resident of Cleveland is entitled to claim wages or salary as exempt, is indebted to one or more persons for necessities, such resident may assign to a person designated by the court, as trustee, twenty per cent. or more of his personal earnings for the equal benefit of creditors then holding claims for necessities. A few examples will suffice:

(1) Mr. X., a poor laboring man earning \$1.75 a day, had seven children. Four died during the panic of 1907, probably from the lack of proper nutrition; at least Mr. X. was out of work a great deal during this period.

The sickness, funeral expenses and so forth caused him to fall behind until he became indebted to the extent of \$400.00 for necessities. That he was honest and saving is evidenced by the fact that he paid off the funeral bills, doctor's bills and

other expenses incurred during this period of trouble. He was constantly harassed by creditors and during the winter of 1912-1913 was garnished some forty times.

He, of course, was compelled to change employment a great number of times, as all employers in this city have the rule that a man will be dismissed from service as soon as his wages are garnished.

During the fall of 1912 because of the lack of nutrition he contracted tuberculosis and was at that time a positive case. We have since learned that he died from this disease. Debtors owing large amounts can escape harassment heaped upon them by their creditors by taking advantage of bankruptcy proceedings. Why should we not protect a man of this kind who needs it even more than the man of larger earning capacity?

The Trustee's bill is the one effective remedy for such a situation.

(2) Mr. Y. is an expert clerk in a special line of dry goods. It has taken him years to work up to his present position of efficiency. Through no fault of his, sickness came to his home and left him in debt to the extent of \$600. He has five children, all of whom are now in school, requiring the maximum amount of expense on his part to keep them in school without any financial returns to balance up accounts. His creditors have bothered him so much that he has lost two or three positions and is now receiving only \$10.00 a week, where he used to receive \$22.00 a week.

His present employer is willing to keep him although many garnishees come in, because he secures the services of this skilled clerk for less than half of the real value.

The Trustee's bill would enable this man to get back his \$22.00 a week job and thus pay off his creditors and support his family in a reasonable manner. It is expected that through the means and instrumentality of the Conciliation Court, such arrangement as is contemplated by this law will be highly efficient and work out satisfactorily. It properly comes in

this branch—the conciliation department—of the Municipal Court, as it consists of an effort to convince both debtor and creditor that it is the best arrangement that could be made for both.

The Conciliation Court was established to ease the stringency of the law court. It is one of the experiments of modern justice and aims to bring about adjustment of differences in the simplest way and at a minimum expense. It acts primarily in an advisory capacity and secures, whenever possible, the consent or even the co-operation of the litigant. It uses the appeal to common sense rather than ancient precedent. The more complicated and burdensome the law court the easier the task to convince the average man appearing in conciliation court of the economy of peace. Thus we have discouraged a large amount of unnecessary

litigation and have provided a simple method whereby a large amount of necessary litigation may be disposed of in a simple manner at a nominal cost to the litigants.

I will conclude with the words of Lord Justice Bowen of England:

"I hope to see the day when in every case, whatever its character, every possible relief can be given with or without pleading, with or without formal trial, upon oral evidence or upon affidavits, as is most convenient; when it will not be possible for an honest litigant to be defeated by lack of means, by a mere technicality, any slip, any mistaken step in his litigation; when law will cease to be a mere game which may be won or lost by a particular move."

—*Manuel Levine.*

Minneapolis Conciliation Court

The act creating the Minneapolis Court of Conciliation is probably the most carefully worked out attempt yet made to transplant in American soil the Norwegian theory of judicial procedure by way of conciliation as a substitute for the historic adversary procedure of the common law. The history and antecedents of the Minnesota act,¹ together with the reasons why its operation was confined to the city of Minneapolis, are set forth in an article in the *Minnesota Law Review* for February, 1917.² The court has been in operation a little more than eight months, and an initial examination of its accomplishments can now be made. Before entering upon such an examination, however, it is necessary to give an analysis in outline of the provisions of the act.

ORGANIZATION OF THE COURT.—The Conciliation Court is made merely a branch of the existing Municipal Court of the city of Minneapolis, this course being taken with the commendable purpose of

avoiding the multiplication of independent tribunals. The act provides for the appointment of an additional judge of the Municipal Court, to be known as the conciliation judge, and to be appointed, nominated and elected as conciliation judge of the Municipal Court. The clerk of the Municipal Court, through one of his deputies, is to serve as clerk of the Court of Conciliation.

SESSIONS, FILING OF CLAIMS AND SUMMONS.—The court is required to be open every day, except Sundays and holidays, at such hours as may be fixed by rule, and at least two evenings in each week. Any person having a claim within the jurisdiction of the Municipal Court may appear before the conciliation judge or his clerk and state his cause of action without pleadings and without formality. If in the office of the clerk, the complainant must verify his claim, which must show in writing the names and places of residence of both plaintiff and defendant, and a brief statement of the amount and nature of his claim, and the time when it

¹*Laws of Minnesota, 1917, c. 262.*

²1 *Minnesota Law Review* 107.

accrued. This claim is to be drawn up by the clerk when requested. Upon entry of the claim upon the docket of the judge, or its filing with the clerk, it is set down for hearing at a time certain, which must be within ten days from the date of entry or filing. The party defendant is then to be immediately summoned by the judge or clerk, orally, by telephone or United States mail, or by personal service of written summons in accordance with the practice prevailing in the District court. Such summons notifies the defendant in one of the methods recited above, of the name and residence of the plaintiff, of the nature and amount of his claim, and requires defendant to appear personally before said judge at the time set; and that, in case he fails so to appear, a default judgment will be entered against him.

JURISDICTION OF THE COURT.—The act gives the Conciliation Court powers of conciliation co-extensive with the jurisdiction of the Municipal Court (causes involving not more than \$1,000). Its summary powers of disposition are limited, however, to claims not exceeding \$50.

(a) In cases involving more than \$50, the court is purely one of conciliation. If the judge can, by advice and persuasion, bring the parties before him to an agreement, such agreement, when reduced to writing and entered and countersigned by the judge, has all the force of a judgment. If, however, the parties cannot be brought to an agreement, the case must be dismissed wholly without prejudice.

(b) In cases involving \$50 or less, if the parties do not reach an agreement, the court is empowered to proceed and summarily to hear and determine the case. The settlement, when entered by the court, whether reached by agreement or imposed by decision of the court, has all the force of a judgment. It is further provided, however, that, subject to certain rather onerous conditions imposed, a dissatisfied party may within five days after the entry of judgment, remove the case, if entitled to a trial by jury, to be tried *de novo* in

the regular session of the Municipal Court. This privilege of removal is rendered necessary by the proviso of the state constitution extending the right of trial by jury to all cases at law without regard to the amount in controversy.

(c) In cases involving the ownership or possession of personal property of a value not exceeding \$50, the court, in its discretion, upon the sworn statement of the claimant as to his ownership or right of possession of such property, may direct the officer of the court to take possession and hold the same subject to the further order of the court without requiring any bond whatever.

DEFAULTS.—In case the defendant fails to appear at the time set the judge may, at his discretion, continue the case or enter a judgment by default. The judgment debtor is to be notified at once of such default judgment and has the privilege, within ten days, of appearing before the judge, and upon showing good cause, having the default judgment set aside upon payment of \$2, to be held for the benefit of the plaintiff.

ENFORCEMENT OF JUDGMENTS.—No executions issue from the Conciliation Court, but any judgment creditor therein can, upon request, procure a transcript of the judgment, which may be docketed in the office of the clerk of the Municipal Court as a regular judgment of the Municipal Court and execution thereon issue in accordance with the provisions governing such procedure in that court.

It is expressly provided that a judgment of the Court of Conciliation may provide for its satisfaction by payment into court of either a lump sum or installments in such amounts and at such times as the judge may deem under the circumstances just and reasonable.

PROCEDURE AT TRIAL, AND COSTS.—No procedure whatever is prescribed for cases before the Conciliation Court save that the parties to the action must appear in person, or in case one of the parties is a corporation, in the person of one of its

officers. Attorneys are not allowed to participate in any manner whatever in the proceedings, although they may act for a client who desires to remove a cause to the Municipal Court. No costs are taxed to either party, but the judge may, at his discretion, include in the settlement and judgment, the actual disbursements of the prevailing party if it seems to him just so to do. A fee of \$2.00 may be required for setting aside a default judgment, while certain other small charges are made to a party removing a cause to the Municipal Court.

RULES.—The judges of the Municipal Court are expressly empowered to prescribe such rules as to procedure, methods of producing evidence and general conduct of the case as may be deemed necessary for carrying out the provisions of the act.

Almost from the day on which the court was opened for business its success outran the expectations even of its most hopeful well-wishers. Quartered in a large and airy court room, furnished in massive simplicity, the court is clothed with that outer semblance of dignity and authority which undoubtedly has its influence upon the minds of litigants in reducing to their proper proportions the petty quarrels which they bring there for settlement. The judge's chambers, opening into the court room, are ample, and the office of the clerk is conveniently located nearby.

The course of procedure, as worked out in practice, is very much the same as was anticipated. Practically all claims are filed in the clerk's office where the clerk, himself trained in the law, is always ready to lend a sympathetic ear to the infinitely varying stories of mingled wrong, folly and misfortune, and to advise the complainants what next step they should take, if any, to secure redress. Many of their complaints are beyond the power of any court to remedy, and such would-be plaintiffs are advised to go home and avoid similar mistakes or follies in the future. The clerk estimates that nearly one thousand complainants have refrained from fil-

ing claims upon being advised that they were clearly entitled to no remedy within the jurisdiction of the court. The clerk also frequently lends a helping hand when the complainant, as often happens, is too ignorant or inexperienced to fill out the simple form, which takes the place of a declaration or complaint. The clerk then sets a day for the hearing. This is usually one week distant unless he learns that an earlier or later day will be more convenient to the parties. The summons, immediately sent to the defendant, usually by mail, but sometimes by telephone, notifies him of the filing of the claim and the day and hour set for the hearing, and informs him that judgment by default will be entered against him if he does not appear. The informality in the service of summons does not work any real injury since the very liberal discretion possessed by the judge in dealing with defaults enables him to protect defendants in those rare cases in which the mail goes astray. The fee for setting aside default judgments is seldom required.

In those cases where the plaintiff makes a sworn claim that he has been wrongfully deprived of the possession of personalty, the judge does not hesitate, where the needs of justice require such action, without requiring any bond whatever, to send a bailiff to take possession of the property to await his further order. Of the cases thus filed little more than one-half ever come up for hearing. The remainder are settled before hearing on the advice of the clerk or of the judge in chambers, or through the mere influence of the very harmless-looking summons to appear in court. Thus of the 3,500 cases disposed of up to April 23 last, 1,745 are recorded as settled out of court.

Hearings are now usually set for three days in the week. When a case is called the parties advance to the bar, removed only about six feet from the judge's bench. Sometimes they bring witnesses with them, but usually they do not. From this point the proceedings are best described by reporting a typical case. After identifying

the parties the judge asks the plaintiff what the dispute is about, and the following colloquy takes place:

Plaintiff: "Has this fellow got any right to fire me from my job at the end of the week without notice, after I had worked seven months for him and left a good job to come to him?"

Judge: "Were you hired by the week?"

Plaintiff: "Yes, I was, but I was fired just because he got a new foreman who didn't like me. I am a good workman and I've got a right to a week's notice."

Judge: "Did the defendant promise to give you a week's notice?"

Plaintiff: "No, not just so, but that was my understanding."

Judge: "Could you have left at the end of a week?"

Plaintiff: "I always give three days' notice before I quit."

The judge then asked the defendant what he had to say about the matter, and was told that defendant's foreman concluded that the plaintiff was an unsatisfactory workman; so he "paid him up to the end of the week and let him out." The judge then, in kindly tones, explained to the plaintiff what were his legal rights under a contract of employment; how he must stipulate for notice if he wished to have it; and dismissed the parties. The clerk wrote "Dismissed" on the calendar and the case was disposed of, all in just five minutes.

Something over twenty-five per cent of the cases that come to a hearing are settled by agreement of the parties upon the advice of the court, and thus disposed of without judgment. In the remainder of the cases set for hearing judgments are entered either after summary trial, or upon default.

Most of the judgments entered are satisfied by payment to the clerk or directly to the judgment creditor. Only 83 transcripts of judgments have been issued for docketing in the office of the clerk of the Municipal Court in order to enable the plaintiffs to sue out writs of execution.

The cases for the most part involve dis-

putes about wages, rents and small claims of infinitely varying origin. Many of them are petty, and some are squalid and discreditable, but all of them are very important to the participants. The greater number of contested cases turn upon issues of fact, though in some cases the quarrel is due to different theories of the parties as to their legal rights. In one case at least a litigant with flashing eyes placed her claim of right to remove furniture from the plaintiff's house squarely on the constitution, though she failed to indicate on what constitution she relied, or what particular provision was applicable. The non-technical and conciliatory method of disposing of these questions of fact may be best shown by reporting briefly a typical case.

A prosperous looking man was sued for \$7.05, alleged to be due for work done upon his automobile. The defendant stated that he had told the plaintiff's foreman to renew the grease in his machine, while the plaintiff asserted that the defendant had told the foreman to change the grease and do anything else that he might find necessary, and that the foreman, finding a certain spring broken, had replaced it with a new one. The defendant, with considerable show of indignation, denied authorizing any work save the greasing. He said he was perfectly willing to pay for the work he had authorized, but he was fully determined he would not pay for a job he had never ordered; that he was tired of having repair men run up bills on him. He asked that the case be continued, and the foreman brought in as a witness. But the judge thought otherwise, remarking that it would be a pity to use up more of the time of useful workmen on such a trifling dispute and by a few brief questions got the defendant to admit that the work had been done, that the charge made was not particularly unreasonable, and that in his opinion the foreman had acted in good faith in doing the disputed work. "Well," said the judge, "don't you think you would better pay the whole bill and waste no

more time over the matter?" A rather sheepish grin spread over the defendant's face as he replied, "I guess you are right, Judge," and forthwith paid over the amount.

Another brief report will indicate the court's total disregard of the formal rules incident to our accustomed adversary procedure, as well as the method of disposing of conflicting testimony as to the questions of fact. The plaintiff appeared with her daughter, the desire for combat apparent in every gesture, especially in the forward thrust of her chin. There had evidently been some words between the parties. The belligerent plaintiff needed no invitation from the judge to tell about the trouble. In her opinion the defendant was a cheap skate. She had hired plaintiff's daughter to look after her children, promising to pay her \$2.50 a week, but hadn't lived up to her promise, and now owed plaintiff \$14.00, which sum, she averred, the defendant was trying to beat her out of. The defendant, a neatly dressed young matron of quiet bearing, evidently found her part in the trial embarrassing and painful. She stated that she had hired the daughter at \$2.00 a week, and not \$2.50; that the girl had worked for her seven weeks and had received all that was due her except \$5.80, which she had always been ready to pay. Here the daughter broke in to deny that she had received the amount stated by the defendant, saying that she had received a smaller sum and had worked for a longer period. At this point it developed that the daughter was of full age and that all dealings with reference to the hiring and payment of wages had been with the daughter. This left the combative mother entirely out of the case. The judge might have told her as much; he might even have dismissed the case on the ground that it had been brought by the wrong plaintiff. But it is very doubtful whether any of the parties, particularly the mother, who wanted to be in the fight at the finish, would have appreciated the principles of law that might have justified the judge in

so determining the case, especially in view of the fact that the daughter, according to the mother's frank statement, was not very bright and had to "have somebody stick up for her." The judge calmly ignoring such an irregularity, in his mind substituted the daughter as the party plaintiff, and proceeded to soothe the belligerent mother and reason with the embarrassed defendant. When finally he said to the defendant, "Since you find yourself mixed up in this quarrel, don't you think you had better pay the girl \$10.00 and settle the whole matter?" The defendant acquiesced at once and the parties left the court room, it is hoped, without any disposition to continue their quarrel.

Another case will illustrate the curious questions that are brought before the court and the informal way of dealing with them. Plaintiff had leased a certain furnished house from the defendant. Trouble had arisen in regard to the furniture, the defendant threatening to remove it. The plaintiff had then brought an action in the District Court and had secured a judgment declaring that under the lease she was entitled to possession of the furniture, and an order restraining the defendant from interfering with the plaintiff's possession. The defendant, however, was convinced that the decision of the District Court was wrong. Acting on this belief she proceeded to remove the furniture by force. The plaintiff might have instituted contempt proceedings in the District Court, but instead she brought the matter to the Court of Conciliation. The defendant was highly indignant and demanded that the judge should read the lease and decide the case in accordance with justice and right and the terms of the lease, which she insisted the District Court had not done.

She found it difficult to accept the principle of *res adjudicata* as the judge endeavored to explain it, so he proceeded to enter judgment. The plaintiff knew the second-hand purchase value of the furniture in question but did not know what

would be its rental value for the remainder of the term. Having gotten a description of the furniture, the judge, by telephone, called up a person engaged in the business of selling and renting such furniture, satisfied himself as to what was its rental value and told the defendant that she might return the furniture or pay \$18.00 as its rental value. She decided that she would return the furniture, although it was manifest as she left the court room that she still had no proper appreciation of the doctrine of *res adjudicata*.

A final case may be given as indicating another phase of the court's work. The plaintiff, a well-dressed and rather kindly looking man, was suing the defendant for \$48.00 unpaid rent. The defendant explained that he had been ill for three months, that he had not yet fully recovered his strength and that he had gotten behind with all of his bills and he didn't see how he could pay the plaintiff's house rent. When questioned by the judge as to whether he had a job, he replied in discouraged tones that he wasn't strong enough to do heavy work, that the pay for light work was very small and that it wouldn't be much use anyhow as his wages would be garnished. The judge then proceeded to encourage him to get the best kind of job he could and to pay off his debts gradually. He told him that he ought to pay the plaintiff, and that he would see that the plaintiff gave him as much time as was necessary. The defendant said he thought he could pay \$10 a month if he wasn't pushed. The judge, however, told him he thought he had better not undertake to pay more than \$8 a month and that he would enter judgment for the \$48, payable at the rate of \$8 per month. The plaintiff, who evidently did not enjoy the appearance of being an oppressor of the poor, readily assented to this arrangement.

The purely conciliatory jurisdiction of the court over causes involving amounts in excess of \$50 has been very little used. The act permits the written agreements

drawn up by the parties to such causes under the advice of the judge to be entered upon the docket as judgments, but in the few cases in which the judge has been called upon to bring the parties to agreement, voluntary settlements have been made in accordance with the agreements reached and no judgments whatever entered. Under the present form of the act it is not to be expected that many cases involving amounts larger than \$50 will be brought to the court inasmuch as the judge, in such cases, has no power excepting to give advice, and there is no penalty whatever put upon either of the parties who refuses to settle in accordance with the advice of the judge. If the plaintiff does not like the proposed settlement he can ignore the whole proceeding and bring his action in the appropriate regular court. So, if the defendant is unwilling to consent, the plaintiff must then pursue his appropriate remedy in one of the regular courts, having his trouble for his pains. In the opinion of the writer the provision contained in the Norwegian law requiring a plaintiff, before bringing in a regular court an action that could have been settled in the Court of Conciliation, to produce a certificate that he had unsuccessfully attempted there to settle it, would result in greatly increasing the number of causes settled by conciliation rather than by the expensive and irritating method of adversary procedure.

The lawyer reading the outlined reports of the typical cases given above may be disposed to say that it is a very rough sort of justice that is administered, and that such justice is dear even at the very low cost entailed by procedure in this court. But it is very evident that the litigants do not entertain any such opinion. In nearly one-half of the 3,500 cases disposed of by the Court of Conciliation, judgments were entered. In fewer than fifty of these cases was there any expression of dissatisfaction, and only eight of them were removed to the Municipal Court for jury trials.

The fact that the Court of Conciliation

is absolutely free to all complainants naturally made it appear as an attractive agency for the collection of small claims to public utility companies and other concerns that have a large number of customers and a proportionately large number of small claims. Thus upon the establishment of the court the telephone companies, the gas and electric companies, some of the commission merchants and others expressed their intention of dumping all of their small claims into this court for collection without cost. But a rule prohibiting any single plaintiff from filing more than three suits in any month very promptly checked this flood and preserved the court's time and energy for the kind of litigation for which it was intended, that is the petty causes of the poorer citizens of the community which could not economically sustain the heavy costs incident to adversary proceedings in our regular courts. It is obvious that the success of such a court as the Minneapolis Court of Conciliation depends almost entirely upon the qualifications of the judge. The Minneapolis court has been very fortunate in the appointment of Hon. Thomas W. Salmon as its first judge. Judge Salmon's courtesy and patience, his kindly manner and deep sympathy with the misfortunes of the poor, his tact and sound judgment have enabled him to carry on this kind of judicial work, so new and untried in this country, with gratifying success. Certainly the reproach that justice is only for the rich and prosperous is taken away from the city of Minneapolis.—*W. R. Vance, Dean of University of Minnesota Law School.*

Wasting Jurors' Time

Mr. Charles A. Boston, of the New York City bar, has addressed a letter to members of the American Bar Association Committee on Jurisprudence and Law Reform in which he suggests a diminution of jury trials as a war-time economy. "Economic waste involved in the jury system is tremendous at all times," the letter says, because it sets thirteen men to doing

one man's work. In most equity cases one man is adequate to do the work. The disputes in equity involve as serious questions of fact and every consideration of justice is as well met."

We must diminish the number of jury trials, or excuse from jury service those who are needed in commercial activities, or lose part of our energy needed for war work. The least excusable of the waste chargeable to juries is in respect to the trial of small causes. Thoroughgoing reform implies proper organization of the judiciary so that specialist judges may be cheerfully accepted by litigants in lieu of juries, but conciliation and informal procedure set forth in this number offer great opportunities for immediate progress.

Conserving Court's Time

The Lawyers' Association of Illinois recently discussed methods of relieving congestion in Cook County courts and adopted a resolution declaring that so far as possible litigants and attorneys should avoid taking the time of the courts by requiring proof of facts not in dispute. There is great opportunity for saving time in this respect. If judges were so organized as to feel individual responsibility for clearing up dockets they could readily bring to bear the influence which is needed. It would seem that in this reform, as is the case with so many opportunities for improvement in trial practice, the initiative must come from the bench. Counsel can concede no possible source of advantage. Ours is a contentious kind of procedure and the lawyers are first of all contenders. But contentious procedure implies power in the judge and a sense of responsibility for the detailed methods of trying causes as well as for ultimate results. Where judges are bereft of power and responsibility we have contentious procedure gone mad, as when, for instance, we solemnly and stupidly devote a week or a month to making up a jury. It is a hopeful sign when lawyers' associations admonish their members and suggest improvements to the bench.

Informal Procedure in Chicago

The Municipal Court of Chicago had been doing business more than eight years when a radical experiment was undertaken with the object of making justice real and practical in small causes. The court had inherited from the justices' courts, which were abolished by the Municipal Court act, exclusive jurisdiction in civil causes involving not more than \$200. These causes were subject to trial by a jury of twelve. The requirement that a jury fee should be paid in advance prevented many jury trials and still the jury was always available and in many instances was demanded in cases involving only trivial amounts.

Only the most confident litigants dared to go into court without counsel. The result was necessarily great expense both to litigants and to the public—expense so disproportionate to the ends sought as to make justice little more than a mockery in thousands of cases every year. The expense in time and money doubtless deterred many deserving persons from asserting their rights so that the situation was practically equivalent to a failure to afford a tribunal to a large class of the potential litigants of the community.

It costs the public about \$100 a day to maintain a single court room. In such a court probably not more than three non-jury causes or one jury cause can be heard as an average day's work. Now let us consider the cost borne directly by the litigant. If there be a jury trial a party must be represented by counsel. If there be no jury, he still must have counsel if the mode of trial be one involving the formality which is essential in the trial of a cause of some financial importance.

The great difference between such a trial, and one involving a relatively small amount is this: when a fairly large amount is involved a review by a court of appeal is economically possible and review becomes a potential element of justice. But in the small cause a review is sure to defeat the ends of substantial justice in

ninety-nine cases out of a hundred. Justice must be got in the court of first instance or not at all. Now, formality or trial is essential to making up a record upon which a review can be had. The formal mode of trial calls for the presence of counsel whether or not there be a jury. And with formality of trial and attorneys the trial is certain to occupy a good deal of the court's time and so justify substantial attorneys' fees. So it is probably conservative to hold that in the average case tried in a formal manner the cost to both parties for witness and attorneys' fees and loss of time is about equal to the cost imposed upon the public in the maintenance of the court and its staff.

The conclusion is that in dispensing justice in small causes it is impossible to justify such a high scale of expenditure even as a matter of abstract theory because it is certain to bar many needy and prudent persons while putting a premium upon the litigious and the unjust. If there was any way to make justice cheap enough to be practical it was the duty of the court to find that way and embrace it.

The Small Claims branch was established in February, 1915, by an executive order after a committee of judges had made a study of the subject, involving a visit to the Conciliation branch court of Cleveland. The order simply directed the clerk to place all suits in which \$35 or less was claimed on a special calendar to be heard in a separate branch to be known as the Small Claims branch. Another order directed Judge Newcomer to sit in the new branch. That was all there was to it. No legislation was required. No new procedure was devised.

In order to try these causes expeditiously it was necessary to discourage continuances. Trial should come on return day if at all possible. Jury demands must be discouraged. If insisted upon the cause would have to be transferred to another branch because the Small Claims court

could not be burdened with a jury. The final opportunity for saving time obviously lay in having the judge question the witnesses and limiting argument to actual needs.

It will be noted that after eliminating continuances, juries, formal rules of evidence and windy arguments there yet remained all the essential elements of our traditional contentious procedure. There was a public hearing; the parties had counsel if they desired; evidence was received under oath; a finding of facts was made and the law was applied to the facts by a trained judge.

The only difficulty in instituting the new method lay in overcoming the prejudice of the bar. In this respect Judge Newcomer's tact and force were signally successful. Lawyers were ashamed to insist upon wearisome trials of these little causes. The witnesses were sworn and had told their stories in the time usually required for asking for a continuance. Judgment forthwith was the only sensible sequel.

So the experiment triumphed. The Chicago Bar Association assisted by adopting resolutions calling upon its members to lend assistance to the Small Claims court. In a few weeks it was a going institution. Contested cases were tried at an average of fifteen minutes each.

There was some fear at the outset that the court might be flooded by collection agency causes, but the fear proved to be unfounded. The public evidently liked informal justice. It was not only possible to set up such a tribunal readily, but the environment afforded by the organized court of which it was a branch was perfectly suited to a waiver of all the technical rules which constitute, according to Professor Pound, the "etiquette of justice." This was because the judge was known by all the parties to be entirely unprejudiced in the particular cause and to be a member of a responsible body of judges specially chosen for this work. In a small community such full reliance upon

the disinterested nature of the judge could hardly be presumed.

This procedure imposed no hardship upon the lawyer. Obviously no experienced attorney could afford to devote more than a few minutes to the trial of a little cause without charging his client a fee out of proportion to the amount involved. It may be urged that the inexperienced lawyer should be permitted to get his training in trial work in such petty causes. This is to be vigorously denied. One of the great evils of the profession throughout the country has been the existence of inferior courts in which most fledgling lawyers acquire their training. It is one of the reasons for the very bad forensic training which they receive. No experience could be worse for the young lawyer capable of real progress than to imbibe of the muddy stream that pollutes the inferior court. Better by far that he should assist experienced trial lawyers in one important cause than try one or a dozen cases in a pettifogger's court.

But there was even an affirmative advantage to the lawyer, for he earned his fee in less time than when he had to hammer out a little case before a jury. And there were doubtless enough more cases brought to offset those in which counsel were dispensed with.

The proof of the success of the Small Claims court lies in the fact that appeals are practically unknown, jury demands extremely uncommon and there has since been three extensions of jurisdiction. A few months after its creation the jurisdiction of the branch was raised to \$50. One judge disposed of about 1,000 cases a month during the first year, but a large proportion were settled because there was no good defense and no opportunity for stalling, or went by default. In the following year the jurisdiction was raised to \$100 and an additional judge was assigned; the third increase came in 1917 when the limit was raised to \$200 and a third judge was put on this calendar.

During the first four months of the present year 6,863 causes were disposed of

in the Small Claims branches. There is reason for believing that the total for the year will reach 30,000 or nearly half of all the civil causes of the court, which has exclusive jurisdiction in these cases for a city of 2,500,000. There are many little causes also in the special branches for attachment, replevin and garnishment and landlord and tenant causes, which were not assigned to the Small Claims calendar because expeditious procedure in these cases had been previously attained.

Informal procedure rests in theory on the simple proposition that justice should not cost unduly, *providing real justice can be had at a moderate price*. Just how much the public can properly be asked to pay for the maintenance of courts to adjudicate private disputes is incapable of definition. It may be fair to say, though, that it is absurd that a jury trial in a cause involving \$300 should cost the parties for witness and counsel fees \$75 and the public a like amount for maintaining the judge and all the paraphernalia of the court room. If informal procedure gives good results in cases involving \$199 there appears no good reason why it should not suffice for those involving twice as much. It may be that there will be another raise in jurisdiction in this department in the future. Or it may be that the habit of trial without a jury will become so fixed in all lesser litigation as to yield the same practical result as if the cases fell specifically within the Small Claims calendar.

After all, the main thing is dispensing with the jury. It is the jury that causes all the flub-dub of the court-room, giving to trials their histrionic and time-consuming character. In trial before a judge the testimony is introduced without long argument on admissibility; without the jury for an audience there is little inducement to oratory. And while in certain quarters there is great veneration for the verdict of the twelve ostensibly good and true men there are few who dare assert that the experienced judge will not reach a truer conclusion than the jury in the general run of civil actions. At any rate the trial

by a judge alone has outstripped trial by jury in Chicago in free competition. Litigants are satisfied.

It is probable that our great reliance upon juries in little civil causes is due directly to the fact that for a generation or two our inferior courts have been lamentably weak. One or other of the litigants have felt compelled to get away from the particular local judge. The solution lies in supplying a *first class judge* for little causes. There is in reality no other solution.

Proof that complexity of procedure and technicality in the rules of evidence are largely complementary to the jury system is afforded by the known informality in proceedings before masters and referees and before compensation and utility commissions.

If it be true that the jury is the principal source of trouble in small causes—say those involving less than \$500—it does not necessarily follow that we should amend constitutions or statutes. The proper course for evolution is to supply a capable judge as a competitor to the jury. Chicago's experience supports the belief that the public is not nearly so hard to wean from the jury as the average lawyer believes.

Like other instances of specialization, through branch tribunals specializing on functional lines, the Small Claims court has not only increased service to the public but also has reduced the volume of work for the court. The interests of the court and the public it serves are identical in respect to economical methods of procedure. Were it not for the great saving in time to the court it could not possibly have kept abreast of its work in the three years since this experiment was begun.

We will not attempt to appraise the worth of the Small Claims court to the people of Chicago. But we may briefly suggest that it affords substantial justice, rather than its mere shadow, to about half of all the litigants in the community. It confers a benefit upon the litigant who

loses quite as much as on him who wins the judgment, for he learns his rights before he has been quite ruined. Only the deadbeat suffers. Speedy adjudication at low cost possesses some of the merit of conciliation, for it cauterizes social wounds. Who can say how much of bickering, of social feuds, of heart burnings

and hatred, of incentive to crime are prevented by prompt and cheap justice? And perhaps best of all is the fact that the people come to realize that they have a friendly and efficient court, "a just and a powerful protector in the law," so that their natural instinct to respect law and government is promoted and not blasted.

Informal Procedure in New York

The Conciliation and Arbitration departments of the Municipal Court of the City of New York have been described in earlier numbers of the JOURNAL so the present account will be comparatively brief. The rules appear in vol. 1, no. 2, and an explanation of the procedure in vol. 1, no. 5.

The justices of this court desired to make true conciliation procedure available to the full extent of the court's jurisdiction, \$1,000. They also wished to make trial in an informal manner possible in all cases by consent. Such a hearing is substantially an arbitration.

So two sets of rules were drafted. The conciliation rules permit any plaintiff to secure issuance of a notice to the defendant to appear for an informal discussion. Representation by counsel is permitted. No record of proceedings is kept except that if an agreement is reached its terms are entered on the docket. No judgment is entered.

Under the arbitration rules there must be a submission by both parties, who may name a justice of the court, or any other person, to try their cause. Proceedings are entirely informal and no record is kept except the written award of the arbitrator, which, upon being filed with the clerk of the court is entered as a judgment after two days unless both parties object in writing.

These are ideally simple and practical rules, capable of working out substantial justice at a minimum of cost.

But the rules in both classes of pro-

cedure call for some initiative on the part of the plaintiff and compliance on the part of the defendant. There is much to be said in support of the idea of adopting arbitration procedure as a means for escaping costly formality in trials, but general adoption of the idea calls for an education of the public. It will take a considerable time to establish the habit of mind which is essential. Doubtless after commercial arbitration has become more common litigants who are not members of a trade association actively supporting this method of adjudication will appreciate the opportunity to submit their controversies to a judge or to avail otherwise of these simple and effective rules.

But it is really very regrettable that the conciliation feature has so far proved of little avail. The essential weakness of the system lies in the fact that it is not made a condition precedent to the beginning of a regular action at law. If made compulsory it would doubtless be fully as effective as is conciliation in Norway and Denmark. But as it stands it is optional with the defendant to heed the notice to appear. Knowing this, plaintiffs doubtless look upon the plan as impracticable. It is also probable that few plaintiffs know anything about this procedure.

It may be possible yet to make a considerable success of this conciliation procedure if the court will actively lend its aid. It is conceivable that many plaintiffs would give it a trial if its advantages were explained by the clerks who docket complaints and issue summonses. And

there seems no good reason why judgment should not result when an agreement is reached.

The provision permitting counsel to attend conciliation hearings is apparently a mistake. The court might well act on the theory that the judge will take care of the parties' rights. The smaller the audience the more free will the average person be to disclose frankly. And if counsel are to attend how can there be complete sincerity? Though no record is made, and though disclosures are barred from subsequent trial, what can prevent counsel from acquiring information of value later on if conciliation fails? It is hard to see how frank disclosures can be made in the presence of lawyers.

Conciliation in Supreme Court

On recommendation of its Committee on the Prevention of Unnecessary Litigation the New York State Bar Association has endorsed the conciliation idea and sought to give it expression through the following additional section to the Code of Civil Procedure:

Sec. 107-A. Appointment of Commissioner of Conciliation in first department. The appellate division of the supreme court in the first department in its discretion may appoint a commissioner of conciliation to serve for one year thereafter and to continue him in such service from year to year or to appoint another commissioner in his place, as it may deem expedient. Such commissioner shall make inquiry from time to time and in such manner as the court may prescribe by rule as to whether the parties to an action pending in the supreme court in the county of New York can be conciliated upon terms which will render a trial of such action unnecessary. Such appellate division may appoint such clerk, stenographer and other attendant upon such commissioner, and otherwise provide for the administration of his office, as it may deem proper.

The committee reported at the annual meeting of the New York State Bar Association, held January 11-12, 1918, that the bill had failed of passage at the last session, having been introduced at a late stage, but would be again introduced this year and pressed for adoption.

The bill has the essential defect of failing to make the attempt at conciliation

compulsory. It has the further possible weakness of postponing the attempt until after an action has been started. The active resistance of the bar to such procedure is to be presumed in many cases. Even so it affords a method for introducing the principle of conciliation and would doubtless accomplish enough good to fully justify the moderate expense entailed. In fact, it might yield large returns for the public as well as for the litigants induced to accept the good offices of the Commissioner of Conciliation.

Simplicity and Economy

One great crying need in the United States is cheapening the cost of litigation by simplifying procedure and expediting final judgment. Under present conditions the poor man is at a woeful disadvantage in a legal contest with the corporation or a rich opponent. The necessity for reform exists both in the United States courts and in all the state courts.
—*William H. Taft.*

Illinois Is Wide Awake

Illinois voters will pass on the proposal for calling a constitutional convention at the November election. Meanwhile there has arisen an impressive movement, led by Governor Frank O. Lowden, for accomplishing in the 1919 legislature as much court reorganization as is possible under the present constitution. It appears that a fairly thorough unification of Chicago's six courts can be accomplished by legislation and by the same means a full measure of rule-making power can be conferred upon all the judges of the state.

Gov. Lowden has proved to be a formidable leader of non-partisan reforms. His bill unifying administrative departments, enacted in the 1917 Assembly, is called the most remarkable piece of legislation ever passed in a state legislature. In the campaign against judicial inefficiency he is supported by the leading public men and newspapers of the state.

In Conclusion

Judicial statistics are pitifully few. Figures obtainable in Chicago indicate that about forty per cent of all civil causes involve claims of less than \$200, and those involving less than \$100 amount to about one-third of the entire number. It is probably conservative to estimate the class of potential small claims, litigants as greater than eighty per cent of the entire population.

The courts that deal with the little suits are emphatically the people's courts. It is from them that the mass of people derive most of their impressions of law and justice. The judges in these courts constitute the norm of judicial learning and character for a considerable element of our citizenship. The conduct of the lawyers who practice in these inferior tribunals constitutes very largely the criterion from which the entire bar is judged in the popular mind.

Our judicial system is gangrenous at the extremities. The bar has always known this, but has chosen, for the greater part, to make a joke of this grim fact. Lawyers are naturally interested only in those courts in which they earn their living. Unfortunately this natural self-interest largely precludes a growth of conscience concerning the people's tribunals. Only a small part of the average lawyer's earnings is derived from the trial of causes. In most instances participation in little trials by the lawyer is a dead loss to somebody, and often it is a loss to the lawyer himself. Even for those lawyers who are dependent upon all the little fees which can be picked up in magistrates' courts there would be direct gain through expeditious trials, for earnings are based on results obtained quite as much as upon time spent. Trials consuming half an hour each will net the lawyer just as much as those requiring half a day.

The question of learning trial tactics in little causes has already been referred to. But there can be no worse school for the

young practitioner than the bumblepuppy court. Training should be derived from assisting experienced lawyers in the trial of important causes, and the more important they are, the better the training.

The ease of appeal and retrial is no cure for the defects of the inferior courts. Admit that the client of means can afford to suffer judgment in the first court and then appeal, but this only proves the crying need for competent tribunals of first instance if our judicial system is to yield justice to a large proportion of the people for whom it pretends to exist. Mr. Taft has dealt with this side of the issue so clearly and so forcibly that no defense of our system is possible.¹

"We cannot of course dispense with the jury system," says Mr. Taft, speaking at this point of the Federal Courts. "It is that which makes the people a part of the administration of justice and prevents the possibility of government oppression; but every means by which in civil cases litigants may be induced voluntarily to avoid the expense, delay, and burden of jury trials ought to be encouraged, because in this way the general administration of justice can be greatly facilitated and the expense incident to delay in litigation can be greatly reduced."

In England and the continental countries there has always been a paternalistic attitude toward the people's tribunals. The Scandinavian plan is set forth in this number. In Belgium the justice of the peace has been a great and successful factor in administering justice equitably and without cost. In our institutions we have so perverted the office that it long ago became a byword. In Belgium the justice is a distinguished citizen who is proud to give his time to petty trials for the honor alone.

We took over a similar tradition but in nearly all the states allowed it to deteriorate. The prejudiced and ignorant nature of these petty judges made jury trials in

¹Green Bag, vol. xx (1908), p. 441.

small causes necessary; the jury trial in the justice court went far to make and keep the pettifogger; it made the cost rankly disproportionate to the sums involved.

Reform is not to be obtained through any slight change of procedure in courts presided over by lay judges dependent upon fees. North Dakota learned this in 1893-1895. The least that can be done with respect to lay magistrates is to make them assistants to a single responsible county judge, as proposed in the model state-wide Judicature Act, Bulletin VII-A., A. J. S. Such a responsible county judge can easily adopt the informal procedure which is needed for expeditious and inexpensive trials. If not directly, then by such a plan as that adopted in Cleveland, any judge having rule-making powers can introduce conciliation procedure.

The organized municipal courts of some of our larger cities are free to experiment with these time-saving devices. When the parties litigant are brought face to face before a judge whose interest it is to prevent, and not encourage needless litigation, substantial justice and entire satisfaction can be accomplished in many cases. To get real justice in the smaller causes which go to trial—and all involving less than \$500 should be classified as such—there is only one way, and that is to *provide a competent and trusted judge*, so that litigants will feel safe in entrusting their rights to his determination.

In causes triable in a court of complete trial jurisdiction there is also much room for conciliation procedure as a preliminary step and for more expeditious trials. We know of only one critical investigation of the cost of civil justice in a typical county, and that proved that it cost more to maintain the Circuit Court for Washtenaw County, Michigan, in a recent year, than the total amount of judgments.²

There is a general and rapidly growing

prejudice against the civil jury. The pendulum is beginning to swing dangerously toward the opposite end of the arc. Dangerously, we say, because there is a substantial residuum of value in the civil jury. It is properly a part of our contentious system of administering justice. There is much validity in the commonly heard condemnations of jury trials on the part of intelligent laymen, but the reasonably restrictions observed in the use of the jury in English and Canadian courts afford results which are undeniably good. It is the perversion of the common law jury, left in practically all of our states without guidance from the judge, which, more than any other single thing, makes our civil trials so costly and so uncertain in results.

Conciliation proceedings in respect to the foreclosure of a railroad mortgage would be absurd. In Norway and Denmark there are classes of cases excluded from their conciliation system. Possibly the plan would have little practical value in disputes involving enough to warrant the retaining of counsel, for conciliation should be effected before the parties have resorted to lawyers to be fully preventive of loss. But at any stage it probably would prove exceedingly efficacious in divorce suits.

It is the glory of the medical profession that it is able to show that its highest aim is prevention rather than cure. This must be the aim of courts and lawyers with respect to needless litigation. The way to prevent is not to make litigation costly and to punish the persons who invoke judicial aid, as we have been doing. It is not litigation generally, but *needless* litigation that should be prevented. The courts should be open freely to all and should offer kinds of procedure calculated to conciliate parties amenable to its kindly offices, to adjudicate forthwith the disputes which must be economically handled if substantial justice is to be done, and to winnow out for meticulous consideration the causes which deserve formal trial. The new procedure which is coming will stress prevention as better than cure.

²See *The Cost of Public Justice*, by Prof. John R. Rood, III. *Law Review*, vol. xli, p. 640 (March, 1918).

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To Promote the Efficient Administration of Justice

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Editorial

It is impossible to dissociate judicial reform from "win the war" work. In these days, when the utmost economy of time is imperative, every saving in every field is of national value. The savings through conciliation procedure set forth in the June number of the JOURNAL open a wide avenue for concerted effort toward a not far distant goal.

This number deals with the same practical needs from another angle. Our first article, on the "presiding judge system," is probably as valuable a contribution on judicial efficiency as has ever been written. Judge William A. Huneke, the author, has been all through the experiences involved in city courts. He writes only of what he has intimate personal knowledge. In his city, and in others to which he refers, a considerable measure of efficiency—a very great measure in comparison with former conditions—has been attained by the application of what is the mere common sense of the business world.

In these courts the full measure of usefulness of every judge has been won by a simple voluntary organization which permits one judge to assume responsibility for administration and to direct the activities of his colleagues. The experience gained through voluntary organization of judges should be emphatically useful. Wherever it has been tried it points the way to complete judicial reform. Once a group of judges adopt businesslike methods the results are so striking as to make any recession unthinkable. It may be that, in the progress of our evolution, we shall see a good deal of voluntary and non-legislated reform. This is to be welcomed. In time it will lead to complete unification and the full measure of rule-making power, the need for which is the more clearly felt the more judges grapple with their obvious responsibilities. A higher degree of service on the part of judges will persuade the public to be more generous in delegating the powers which are needed to rehabilitate our judiciary.

We are tempted also to moralize on commercial arbitration as a "win the war" measure. Here is something of tremendous import just coming over the lawyer's horizon. Commercial arbitration is likely for a long time to be limited to large trade centers and yet it is something which every lawyer should understand, and which all bar associations should interest themselves in because it inevitably tends to affect the relationship of the profession to the business world.

Arbitration must not be looked upon as a competitor of the courts, nor as a means for avoiding inefficient court organization and procedure. It is rather an extension of our machinery of adjudication to perform a work which the courts can never perform as well. When this is understood the courts themselves will co-operate with arbitrators, limiting their responsibility to a general supervision and to the determination of questions of law.

For the determination of fact in business controversies no court can expect to cope with arbitrators selected by the parties and expert in the particular branch of trade involved. When facts are determined by these voluntarily accepted arbitrators, and questions of law by the nearest court, the business world will possess the best conceivable means for the speedy adjustment of its ordinary disputes.

The Presiding Judge System

The purpose of this article is to show what has been done, and, therefore, what can be done by the judges of courts of general original jurisdiction in the large cities of our country, without legislative aid, in improving the administrative functions of their courts, to the end that the work of such courts may be simplified, systematized and expedited.

This delimitation necessarily excludes an examination of the modern city courts which exist in several of our large cities, because they are creatures of statute. It also excludes consideration of the splendid administrative success which the judges of these courts have achieved. The legislative conception of these courts and their development by the judges, deserve unstinted praise since they mark distinct forward steps in modernizing the judicial structure. It also excludes any excursion into the domain of legislative or constitutional activity, but does not forbid calling attention to a few examples of preposterous legislative creations which still survive in some of our large cities, in order that a better grasp may be had of conditions with which judges have had to contend who earnestly desired improvement. A few of these examples must suffice:

1. In one of our large cities, twenty-four judges are engaged in the trial of various actions, civil and criminal, but instead of being members of one court, there are eight separate, distinct and wholly independent courts. One of these courts has jurisdiction of civil actions involving more than \$2,000; also of misdemeanors involving a punishment severer than six months' imprisonment; of felonies; and appellate jurisdiction of judgments of lower courts. Another of the courts has jurisdiction in civil actions up to the sum of \$2,000. Another has jurisdiction of all civil actions involving more than \$100, and also probate jurisdiction. Another has jurisdiction of felonies and mis-

demeanors in which the punishment is more than six months' imprisonment, and appellate jurisdiction from all inferior criminal courts. Another tries only misdemeanors when the punishment cannot exceed six months' imprisonment. Still another tries petty misdemeanors in which the punishment cannot exceed thirty days in jail. Another has civil jurisdiction in actions which do not involve more than \$100. Finally, there is a court with jurisdiction over delinquent and dependent children. But aside from the fact that there are these eight independent courts to transact this business, each judge of each court is wholly independent of his fellow judges. When the constitution or legislature or both have created such a confused plan, there is comparatively little that can be done by the judges of the courts. Yet, something can be done by them, for in each of two of these courts are five judges who ought to find a way, independent of statutory aid, of simplifying and systematizing and facilitating the work of their courts.

2. In another of our large cities, the existing judicial system is even more lamentable than the one just described. In this city there are no less than ten different courts with perhaps twice that many judges. There are three common law courts of practically the same jurisdiction, though called by different names: one the Superior Court; another the Court of Common Pleas; and the third the City Court. In addition to these are two equity courts of precisely the same jurisdiction, but here again, each bearing a different name: one the Circuit Court of — and the other the Circuit Court No. 2 of —. Then there is a criminal court of exclusive criminal jurisdiction. These six courts are manned by ten judges who, together, constitute another independent court whose trial work consists in passing upon motions for new trial in criminal

cases and in hearing and deciding disbarment proceedings. Its chief function lies in the management of the work of the six courts, which it does by assigning its members to these various courts. In addition to these seven courts in the city, are the Orphans' Court, with probate jurisdiction, the Juvenile Court and other inferior courts. To the credit of the bar and the bench of this city it should be said that for a long time they have been and are now engaged in an earnest effort to bring about a consolidation of all these courts into one court.

3. In still another city there is a State court of general jurisdiction, common to all the counties of the State. As the city grew and additional courts became necessary, the legislature, instead of creating additional judgeships of that court, created wholly separate and distinct courts, each of limited, though largely co-ordinate jurisdiction with the original State court. The litigant, or his attorney, is permitted to choose the court in which he will bring his action, with the result that while in one year the State court, with one judge, received 1,407 new actions, its rival court, with five judges, had but 3,387 new actions filed with it. In this city, the different judges of the same court act entirely independently of each other. Each receives certain cases; each makes up his own calendar; each calls his own jury; and each tries out his own docket. There is a total lack of co-operation among the judges in the discharge of the court work.

It will not be necessary to cite other cases, since, in a very general sense, the above instances are typical of the old order which exists in a more or less modified form in a number of our large cities, and it must be perfectly obvious, from this description, that this old order is woefully unsystematic; that it is cumbersome and complex; that it is wasteful of time and money; and that it tends to bring reproach upon the courts and upon the law. It became so intolerable to some of the judges about ten to fifteen years ago, that realiz-

ing the hopelessness of relief by legislative help, they undertook the improvement of those conditions by their own rules and voluntary action, with the result that a plan was evolved which has since become known as the Presiding Judge System. Under the system then existing, even in states in which there was but one court of general original jurisdiction, whenever there were two or more judges of that court, the work was arbitrarily divided by the judges into common law, equity, criminal and miscellaneous departments. These departments, by mutual agreement, were then apportioned among themselves. Inequality of labor inevitably followed. One department would be abreast of its work, while another might be hopelessly behind. One judge would have leisure while another never could catch up with his work. This arrangement was inequitable to the judges and worked a great wrong to litigants. Therefore, the two-fold principle upon which the Presiding Judge System was constructed, was that every court, composed of two or more judges of equal powers, should be so organized that its judges should be equally occupied in the discharge of the court work, and that this work should be accomplished as systematically, expeditiously and economically as would be consistent with thorough and conscientious work.

It became at once evident that to avoid inequality of labor, all judges must be ready to do all kinds of court work. It seemed that there must be a surrender of the desire to specialize. It was also evident that the system must have a head and that he must be empowered to distribute the work of the court among the judges so that there would be equality. The result was the selection of one of their number as their head, who was designated the Presiding Judge, to whom the remaining judges yielded obedience in the matter of discharging such court work as he assigned to them.

In the practical application of the Presiding Judge System, greater difficulties

will be encountered in a court of general original jurisdiction than in one of limited jurisdiction, so that if it has been demonstrated to be successful in a court of general original jurisdiction it may safely be inferred that it is applicable to any other court. Instead of describing, in abstract fashion, the method of transacting business under this system, it may be well to visualize a court of from five to ten judges actually at work under it. The court which will be described will be a court of general original jurisdiction, having cognizance of all common law, equity and criminal cases; of all extraordinary writs and remedies; of all insanity inquests; of insolvency; of naturalization; of divorce; and of all probate and juvenile matters. Some of the work is *ex parte*, some contested; some cases are tried by jury, others without a jury.

Judge Adams has been selected as the first Presiding Judge of this court for the period of one year. In some courts this period is shortened to six months, purely a matter of personal choice. His first duty is to assign work to all the other judges in order that they may be kept occupied and the work of the court performed. Perhaps the first question to arise will be who shall settle the pleadings in civil actions. In some courts this work is assigned to one judge, while in others it is deemed best to have it done by all the judges. In the court here being described, this work is assigned by the Presiding Judge to all the other judges. On every Thursday forenoon, the clerk of court makes up a list of all new cases in which some motion or a demurrer has been filed. This list is sent to the Presiding Judge who, in open court, assigns these cases equally to all the other judges. The clerk then makes up a separate motion docket for each judge, containing newly assigned as well as old cases theretofore assigned in which some issue is to be heard. Once a case has been assigned to a judge, it remains before him until the issues are fully made up and the case is ready for trial. The motion docket is called by each judge on

every Saturday morning. If a judge should have a trial unfinished at the close of court on Friday which, for any reason, should proceed on Saturday instead of going over until the next week, he postpones the call of his motion docket for one week. If his motion docket contains matters which require immediate attention, such are disposed of, either by the Presiding Judge himself, or are assigned by him to some other judge or judges.

The writer favors the settlement of pleadings by all the judges, as above outlined, rather than by one or two of them, for several reasons. One is that, in this manner, the work is done more systematically, since all accumulated motions are disposed of on one certain day of every week. Under the other plan, counsel are oftentimes obliged to attend court daily or even more than once a day to dispose of issues of law, which is burdensome at least. This work can be done with much greater expedition and economy on one day of the week. Another reason is that the judges are thus kept in direct touch with pleading and practice and with the cases that are being prepared for trial. Not infrequently it happens that a case is practically disposed of by the ruling upon a motion or a demurrer, made upon exhaustive argument. A later step may involve the same principle and the judge, familiar with it, disposes of it without re-argument. Under this plan each judge exercises his own judgment and follows his own initiative in the settlement of pleadings, whereas under the other plan, a judge is practically compelled to adopt the law as announced by the judge who settled the pleadings, even if he disagrees. Then, too, the danger of passing upon a certain class of motions perfunctorily, when one judge does nothing but that day after day, is lessened by this plan, since under this arrangement, the judge knows his own cases individually.

The next step is setting the trial calendar, and every judge knows that a trial calendar is the administrative stumbling block over which thousands of judges have

come to grief. In some courts a trial calendar is prepared once a week; in others, once in two weeks; but perhaps in most, once a month. The problem, on the one hand, is to set a sufficient number of cases for trial so as to keep courts and jurors occupied and, on the other hand, not to set so many, that the cases cannot be reached for trial, for that would compel parties, witnesses and counsel to be in attendance needlessly, day after day, awaiting the calling of the case for trial. The court here being described has adopted the plan of arranging a trial calendar once each month for the next ensuing month. The clerk of court prepares a list of all cases which have been noticed by counsel for trial, and on a stated day, usually about the middle of the month, the Presiding Judge, in open court, arranges the calendar, day by day, for the next ensuing month, setting as many cases each day as he thinks can be tried and as will keep the judges occupied. This court has been able to keep practically abreast of its trial work, month by month, ever since it was thus organized, several years now, trying both jury and non-jury cases. To do this it was often necessary to call in a judge from an adjacent county. Jury trials, as a rule, are bunched together and tried out by all the judges at the same time, and when disposed of for the month, non-jury trials are taken up also by all the judges. In some courts, organized as this one, it is the practice to set jury and non-jury cases side by side, some of the judges trying jury cases and others non-jury cases, as Presiding Judge may find it convenient to assign them. This latter plan generally aids the dispatch of trial work when there are say ten or more judges in the court, for in a court of that size there are always emergency questions to be disposed of without jury and which the Presiding Judge has not time to hear. Therefore one or two, perhaps three, judges should be free to try these emergency matters and when not thus engaged, try non-jury cases. This is another illus-

tration of the flexibility of the Presiding Judge System. One judge may be trying a jury case to-day and at its conclusion may be assigned a non-jury case or an emergency motion. Some judges excel in jury trials and others in non-jury trials and these qualifications will be remembered by the Presiding Judge, working for the greatest efficiency of the court.

The next step is the actual trial of cases. It is the duty of the Presiding Judge to call a panel of jurors who report to him on the first day of the jury term. Of the panel called, he retains a sufficient number to permit fifteen to eighteen jurors for each court trying jury cases. Jurors, however, are not divided into these small quotas and assigned permanently to different court rooms but are one entire body of jurors under the constant direction of the Presiding Judge. Assuming that seven judges are to try jury cases, then the first seven cases on the trial calendar for the day are assigned, one to each of the seven judges and fifteen to eighteen jurors sent to each court room. The other judges are assigned either emergency matters or non-jury cases. As soon as a jury has been selected in any court room, the remaining jurors are returned to the Presiding Judge, who either holds them in the jury rest room or excuses them until the afternoon session or for the day, depending on the likelihood of needing them for the afternoon session or next day. As soon as a case has been submitted to the jury in any court room, the judge notifies the Presiding Judge, who immediately assigns the next case on the calendar and sends in jurors. When the jury in the first case returns with a verdict, its members are returned to the Presiding Judge, by whom they will be sent out to the next judge ready for a jury. This process continues until jury trials are all disposed of, whereupon non-jury cases are taken up in the same manner. One principle, always kept in mind by the Presiding Judge in the assignment of cases for trial, is that as far as possible, a case is assigned to the

judge who settled the pleadings. This is done for the manifest reason that he is familiar with the case and the issues involved and has established the law of the case in his rulings upon motions and demurrers and will try the case more expeditiously than a judge who is wholly unacquainted with it. The merit of this plan is that it permits the maximum amount of work in the minimum time. If one or more departments tried criminal cases only and others civil jury cases only, the criminal departments, by reason of long trials, might find it impossible to complete the calendar as soon as the civil departments. The criminal departments would then fall behind, while the civil departments would be up. But when all the judges try either civil or criminal cases, as assigned by the Presiding Judge, clearly all will finish approximately at the same time. That is, no one judge will be at leisure while another is swamped with work.

The various contested motions following the trial, such as motions for new trial, motions for judgment notwithstanding the verdict, motions in arrest of judgment, motions to re-tax costs, motions to settle statement of facts on appeal and the like, are placed on the motion docket of the judge who tried the case and are heard on Saturday.

Having disposed of the time of the judges, other than the Presiding Judge, it may be well now to look at his other duties. He has general charge and disposition of all the business pending in the court. He presides when the judges sit *en banc*. He receives and disposes of all communications and applications addressed to or intended for the court. He draws, receives, has control over and discharges all jury panels. He has charge of and disposes of all insanity and juvenile hearings, of all uncontested divorce cases and of all *ex parte* civil, criminal, probate and miscellaneous applications. This looks like a full program and it is so, but the systematic division of his work enables

him to accomplish it with comparative ease.

The first business attended to by the Presiding Judge at the opening of court is the assignment of cases for trial, and at any later hour of the day, he will always interrupt his work to assign out a case for trial. As soon as the assignments have been made in the morning, he hears all probate applications, usually *ex parte*. If there are contested matters of probate or other character, they are passed until the *ex parte* business is disposed of, and these contested matters usually occupy the remainder of the morning. On two afternoons of the week he hears juvenile matters and on the remaining afternoons, uncontested divorce cases. Insanity hearings, of course, are emergency in their character and are heard on any afternoon. If the Presiding Judge should have more to do than he can dispose of, he may call upon any other judge for assistance and, *vice versa*, if he should be unoccupied and there are non-jury trials waiting to be heard, he puts in his time thus.

The entire flexibility of this system to meet any situation must be apparent to everyone. There are no hard and fast rules, but every rule yields to a more compelling situation. It sometimes happens, for example, that a contest in the probate of an estate may require a day, or two or three. Manifestly, if the Presiding Judge were compelled to hear this contest, all other matters must suffer, so he treats it as a trial and assigns it to another judge. This is also true of applications for an injunction or other extraordinary writ or the appointment of a receiver. The Presiding Judge likewise has unlimited discretion in the re-arrangement of the trial calendar and in placing cases upon the calendar which were not at issue when it was first set, and the like, to the end that complete justice may be administered unfettered by any rule.

At the end of the year, Judge Adams is relieved of the duties of Presiding Judge and is succeeded by Judge Bean for a year,

who, in turn, is succeeded by Judges Clark, Day, East, Field, Gray, Hunt, and so on, until each judge has acted as the Presiding Judge. But here, too, the rule may yield to efficiency. If one judge is found who has unusual executive ability and is not averse to acting as Presiding Judge permanently, he may be retained. The same is true with regard to the work of the Juvenile Court. Objection is sometimes made to changing this judge from year to year, and it is conceded that it ought not to be done. However, so long as this is a court of general original jurisdiction and the judges are selected generally for that work, it stands to reason that every judge is not a specialist in Juvenile Court work, and it is entirely likely that no one of them would be. If one of the judges desired to specialize in that department and had the peculiar qualifications necessary to a successful discharge of that important work, unquestionably he would be given that work permanently, in which event the Presiding Judge, thus relieved, could take on other general work. If the work of the juvenile department required the entire time of a judge, well and good; and if not, he would try cases when not thus engaged, as the Presiding Judge should assign them to him.

This system has been in effect in Spokane, Washington, for about eleven years; in Oakland, California, about six years; in Seattle, Washington, five years; and in Portland, Oregon, two years. In all these cities, before the plan was adopted, certain departments were hopelessly swamped, while others were up with their work and had some leisure; now all the judges are practically abreast of their work. Wherever the plan has been tried it has commanded enthusiastic support. In several other cities there is a modified form of the Presiding Judge System, such as San Francisco, Los Angeles and Oakland, California; Birmingham, Alabama; St. Paul, Minnesota; St. Louis, Missouri; Omaha, Nebraska; and doubtless others.

The writer can perceive no valid reason why this system cannot be successfully applied in any court of more than two judges and no matter how many more, and ventures the assertion that under it more work will be transacted than under any other existing plan. The suggestion, published in the April number of this JOURNAL, of a plan for a Metropolitan District Court, does not depart seriously from the system here described. While the writer of this article is inclined to disagree with the statement in that article that a court of thirty judges is too large for a single head, yet that contention may be laid aside for the present. The flexibility of the Presiding Judge System is such that if experience demonstrated that a Presiding Judge could not efficiently direct a court of thirty judges without further organization, such further plan could promptly be adopted. The suggestion in the Metropolitan plan of several divisions of the court is not objectionable so long as the fundamental idea is not lost sight of, that these divisions are but arms of the court, provided to discharge the work of the whole court more efficiently. This means that there must be the greatest flexibility in the shifting of judges from one division to another, to the end that the work in all divisions be kept equally abreast. And this must be so even if a judge who has specialized in one division, must be sent, for a time, to another division. A member of the court should not be permitted, at his own choice, to limit his duties to a fractional part of the whole, but his personal preference must be sacrificed for the general good. If specialization is permitted one judge, manifestly it must be permitted all judges, and if all judges are permitted to specialize, there would, in effect, be a lapse into the very evils of the old order from which the Presiding Judge System has found the escape. Specialization would destroy the *esprit de corps*, the team work, so necessary to the successful operation of the whole court.

Most lawyers and judges are prover-

bially conservative and, consequently, slow to adopt innovations. Objections to the Presiding Judge System may occur to them when reading this description, and straightway the plan and all thought of it will go into the discard. That was true in one of our cities, in which some of the judges wished to try this plan but were stoutly opposed by others. After a year's controversy, the plan was adopted by a majority of one in nine judges. Those opposing doubted its efficacy. After it had been tried a year or two, the bench, and bar as well, were unanimous in championing it. It actually accomplished the results which had been predicted by its supporters, *vis.*, a change from congested to clear dockets. There is, frankly, one objection which may obtain in some courts, *vis.*, the impossibility of compelling any one judge to do his share of the work if he be disposed to shirk. Fortunately, that situation is the rare exception. But it may be asserted without fear of contradiction, that there is no impulse so powerful to arouse an appetite, yes, an enthusiasm for work, as the example of several brother judges all eagerly bent on clearing the docket.

The writer of this article wishes it distinctly understood that he does not champion the Presiding Judge System as one *ne plus ultra*. There is much beyond. What he does contend is that this system is the best yet devised by the voluntary act of trial judges without legislative aid. The bench, the bar and the legislatures of the country should set their faces firmly toward simplifying and systematizing the courts, their practice and procedure. Certainly the existence of several independent courts of co-ordinate jurisdiction in one city ought to be abolished forthwith and replaced by but one court. And what good reason is there against taking the further step of thus unifying the courts of an entire state? One step toward that goal has already been taken in the states in which there is now but one court of general original jurisdiction, in the whole state, with one or more judges for each county, and it functionates as well as other

systems with a score of courts. But the perfection of this certain development will only be reached when there will be but one and only one court of justice for an entire state, with complete jurisdiction, original and appellate, having one head in the state, with power to direct all its judges where to work and what to do, to the end that the administration of justice shall be stripped of all intricacy, and instead, shall be characterized by simplicity, system, expedition, economy and efficiency. —*William A. Hunsake, Judge of the Superior Court, Spokane, Washington.*

Give Courts a Fair Chance

The majority report of the Senate Judiciary Committee on the American Bar Association bill to permit the United States Supreme Court to formulate rules of procedure for suits at law contains this seemingly irrefutable argument:

"It is an anomaly to intrust a tribunal with grave and responsible duties and deny it the power to determine the manner in which these duties shall be discharged. The Senate would not for one moment tolerate the idea of having some outside body determine the way in which it shall do its business. Each house of Congress and every legislative body in the country makes its own rules of procedure. The same is true of substantially every administrative body, state and federal. Congress is constantly passing laws to be executed by one of the executive departments and providing that the head of the department shall make such rules and regulations as may be necessary to carry the law into operation. The courts seem to stand almost alone in this respect. These great tribunals intrusted with the delicate and responsible duty of interpreting and administering the law are certainly qualified to determine the mode and manner which will be best calculated to enable them to discharge their responsibilities surely and promptly."

Commercial Arbitration in England

The following account of commercial arbitration as practiced in London and other British trade centers is condensed from Bulletin XII, A. J. S., to which readers are referred for a more detailed account. Our Bulletin XII contains the most complete and authoritative report on this subject which is extant.

One of the most striking facts concerning British litigation and one commonly overlooked by writers, is the almost total absence of commercial disputes from the calendars of the principal trial court. This is only in part explained by the fact that improved methods of procedure, by eliminating all unnecessary trials, effect a disposal of ninety-seven per cent of the court's large volume of business without trial.

The practice of commercial arbitration which has developed in England in the past forty years saves the courts a tremendous amount of business. Figures are not obtainable, but certainly more than 100,000 causes are arbitrated every year.

Arbitration must not be confused with conciliation or mediation, with compromise or adjustment by mutual concessions. "It is a regular and recognized method sanctioned and governed by law, for the determination of rights and the enforcement of remedies, by which a party aggrieved may ascertain and obtain all that he is entitled to from his opponent, without instituting an action in the courts of law."

Practically every trade agreement made in England or covering the purchase or shipment of goods to be delivered in England, contains an agreement to submit disputes to arbitration. One cannot build or rent a house, ship goods by rail or water, or buy or sell in quantity without signing a contract which contains such a clause.

Arbitration has been practiced in England from the times of the Saxons. In 1697 a statute was enacted to further its

purposes; in 1837 and again in 1854 there were additional acts. The extended modern use of arbitration may be said to date from the American Civil war, which produced so many disputes in the cotton trade that the Liverpool Cotton Association set up an arbitration committee and members inserted in all their contracts a clause requiring disputes to be submitted to the Arbitration Committee of their Association.

The success of the plan strengthened the position of the Association in the trade, and that, in turn, increased the power of the Arbitration Committee so that practically every difference that arose in the Liverpool cotton market between buyers and sellers, whether English or foreign, came to the Arbitration Committee for settlement. Although the parties had a strict legal right to revoke their submission, the disciplinary powers of the Association were sufficient to make parties feel they were better advised to submit if they wished to continue doing business in that market.

Other trades were quick to see the advantage of this system of organized arbitration. The Liverpool Corn Trade Association soon established a similar committee, and then the General Brokers' Association followed suit. The London markets next took it up; the associations existing in the Corn Trade, the Oil Seed Trade, the Cotton Trade, the Coffee Trade, and others, set up their own arbitration committees, and, year by year, other associations either adopted the plan or came into existence with trade arbitration as one of their avowed objects. The various exchanges all molded their committees on similar lines—the Stock Exchange, the Coal Exchange, the Produce Exchange, and others. Then professional bodies began to see the advantage of providing a medium for settling disputes at home instead of by strangers, and the Architects,

the Engineers, the Estate Agents, the Auctioneers and other such groups established domestic tribunals.

In 1889, after a dozen years of agitation, an Act was passed consolidating and revising the law of arbitration and providing in a schedule a simple set of rules to govern the procedure in all arbitrations where no agreement to the contrary was made by the parties. The need for such a simplification in the law is eloquent of the extent to which the principle of arbitration had spread through the English business world. A letter in the London Times in 1883 (probably from Lord Bramwell) said: "It is strange that those who call for changes in the procedure of our courts rarely allude to arbitration. Yet what would be their condition but for the fact that whole trades and professions have virtually turned their backs upon them and uniformly settle their disputes by arbitration?"

Today there is not a trade or professional organization in England that does not provide some means for the arbitration of disputes that arise among members or between members and others, and frequently between non-members engaged in similar work. It is not surprising, therefore, that by this means a great volume of litigation is avoided and commercial disputes kept out of court.

The opportunity to benefit by arbitration has been one of the factors leading to the organization of almost every existing line of trade. One of the purposes of organization is to remove sources of friction between buyer and seller and this is accomplished in great measure through the use of uniform drafts of contract, embodying the collective experience of the trade. In every such contract there is a clause by which the parties agree to submit disputes to arbitration.

The Corn Exchange employs this simple clause:

"Goods sold ex ship to arrive to be taken without refusal, but any dispute arising out of this contract to be settled by arbi-

tration in the usual manner, as per rules of the London Corn Trade Association."

The Corn Trade Association has a complete and efficient code of arbitration rules which are thereby incorporated in the contract.

The contract form of the London Oil and Tallow Trades' Association contains this clause:

"Any dispute on this contract to be settled by arbitration in London as soon as it may arise, in accordance with the rules endorsed upon this contract."

And the rules are found on the back of the instrument.

In every trade there has been developed a body of experts available as arbitrators, men who have mastered the mysteries and intricacies of their respective trades. They may be active or retired business men. There are in the main two types of arbitration tribunals. One is composed of arbitrators chosen by or for the parties for the purpose solely of a particular dispute. The other consists of arbitrators appointed to serve for certain associations for a fixed period of months or years although their relation to any single arbitration is identical to that of arbitrators chosen *ad hoc*.

Enforceability

At common law an agreement to arbitrate, or a submission as it is called, was no different in legal effect than any other agreement. A party to it could at any time revoke the arbitrator's authority, in which case the arbitration was abortive; or a party could, in spite of his agreement to arbitrate, begin a lawsuit upon the same subject-matter and so render the submission useless. In either case the only remedy for the party aggrieved was an action for damages caused by the breach of agreement. The Courts would not enforce the agreement itself, because of a theory that it was in derogation of the powers of the courts and therefore unholy. In the early days judges, as well as other court officers, were paid by fees on the volume of business that came to them and being only human they looked with disfavor upon any

limitations on their powers. It is easy to appreciate the psychology of the legal maxim: "The office of a good judge is to extend his jurisdiction." And speaking of the suspicion with which courts of law regarded arbitrations, Lord Campbell observed: "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive any one of them of jurisdiction." Judges no longer have the same interest to serve, but like some other doctrines in the law, this one survived the conditions out of which it arose, and we hear it solemnly proclaimed in American Courts today that any agreement to "oust the jurisdiction of the courts" such as a submission to arbitration is "against public policy."¹

In England the inherited antipathy of courts to arbitration has been cured by a course of legislation which, though extending over a period of nearly two centuries, is now gathered and codified in the Arbitration Act, 1889. The two outstanding features of that law are that a submission to arbitration cannot be revoked, and that an award of the arbitrators may be enforced like a judgment of the courts. The opening section of the Act reads:

"A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect as if it had been made an order of court."

The effect of this is that a person who has agreed to arbitrate is bound to arbitrate and to accept the award of the arbi-

trators appointed, and cannot revoke their appointment unless he is relieved by the court. Leave to revoke the authority of an arbitrator will, however, be granted for good cause; the principal grounds on which an application for that purpose is made are interest, bias, or misconduct, on the part of the arbitrator, such as to prevent his giving a fair decision.

There are two methods provided in the Act for practically carrying out the enforcement of an agreement to arbitrate. The first is the right given either party to block any action begun in court by the other upon the same subject-matter, by a motion to stay the proceedings. Section 4 of the Act is as follows:

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Armed with this weapon, the defendant in the legal proceedings can force his opponent to resort to arbitration for his remedy and not to the courts. Conversely, the party demanding relief may find difficulty in bringing his opponent into an arbitration. For such a case, Sections 5 and 6 make the following provisions:

"Sec. 5. In any of the following cases: (a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator; * * *

(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him; * * *

Any party may serve the other parties or

¹An exhaustive examination of the early common law has led Mr. Julius Henry Cohen, of the New York City bar, to the conclusion that the belief that the law is hostile to arbitrations is quite fallacious. Mr. Cohen informs the writer that Coke and others appear to have blundered in their efforts to trace the decisions. The result of this modern study of the earliest sources will be presented soon in a book written by Mr. Cohen, who has been energetic in encouraging commercial arbitration in the metropolis. The investigation has an important bearing on certain decisions by our state supreme courts adverse to the legality of agreements to submit future controversies to arbitration. It may appear that something has been written into state constitutions prejudicial to arbitration which is without historical warrant.

the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

"Sec. 6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; (b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent; provided that the court or a judge may set aside any appointment made in pursuance of this section."

By virtue of this the delinquent party may find himself subject to a judgment rendered without adequate presentation of his case and needless to say the presence of the two sections in the Act is itself sufficient explanation of the fact that their powers are seldom invoked.

These sections insure the holding of an arbitration and the rendering of an award whenever parties sign an agreement containing an arbitration clause similar to those quoted above. Their binding force is completed by the following section of the Act (Section 14):

"An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

This gives the remaining party the benefit of all the ordinary methods of execution of which he can avail himself without further legal proceedings.

Backed up by this powerful statute, an arbitration clause in a contract is not a thing to meddle with, for it is easier to enforce than almost any other part of the contract. But there is more than just the statutory influences to support the arbitration clause; even the escapes permitted by the statute are not sought except in cases of necessity and good faith. There is a general opinion in the business community against the breach of arbitration agreements, which is equally potent with the Act. In addition to that, there is the disciplinary power over their members, of all the associations and exchanges that provide some form of arbitration tribunal, which the members find it to their interest to conciliate. In short, a submission to arbitration in England, instead of being regarded askant as contrary to public policy, is favored both by law and opinion and clothed with an enforceability it never possessed at common law.

Procedure

Any dispute which may be the basis for a civil action, except a suit for divorce, may be arbitrated. In practice most of the disputes so submitted are those arising on questions of fact concerning the quality, condition or value of property at the time of delivery. In the ordinary course of business, disputes over facts are far commoner than disputes of law. Some other fields of controversy are whether the conduct of a party, not strictly in accordance with his contract, is nevertheless a reasonable compliance therewith; whether there have been unreasonable delays in fulfilling a contract, and if so what injury has been caused thereby; whether certain services are worth the amount demanded for them, for instance in commissions; questions of the extent or division of business territory; questions of the value of goods or property, real or personal; these are all questions primarily of fact, which cannot always be decided by scrutinizing the terms of the contract. For their decision it seems almost self-evident that the

ideal tribunal is one possessing first-hand knowledge of the values, facts, customs, technical terms and course of dealings prevailing in any particular line, if there can be found together with this knowledge the fairness and unprejudiced effort to give a square deal that a judicial tribunal should exercise.

Until the last quarter of the nineteenth century the only tribunal offered by the English law courts to satisfy this desire was a jury, chosen at random (except in the time of Lord Mansfield), and though often rigidly fair-minded, yet usually hopelessly unable to form any but the vaguest conception of the technical facts involved. This condition has now been changed and trials are now possible in the courts before a judge alone or before an official referee. But these concessions were avowedly made in an effort to compete with the practice of arbitration, to which business men were driven in order to escape from the folly of jury trials in contract actions, a practice which they found so satisfactory that they continue in their wickedness today.

In most instances the parties select their own arbitrators without any restriction upon choice, or agree on a single arbitrator. When each party is represented, and the arbitrators do not agree, they choose an umpire, and in case of inability to agree upon an umpire, the association or the court will make the appointment. A party dissatisfied with the decision may appeal to the Committee of Appeal of the particular association under whose contract form he is arbitrating. In many associations the governing board selects from twenty to thirty members to serve on the Committee of Appeal, and this committee, usually by ballot, creates a Board of Appeal comprising four or five of its members for the particular appeal.

The appeal is then heard by the Board of Appeal and their decision is final on the facts. It is still open to the parties to have any points of law which arise stated to the High Court, from which an

appeal lies to the Court of Appeal and to the House of Lords. The facts found by the arbitrators or the Board of Appeal of the Association have the same conclusiveness as if they had been found by a jury.

In certain associations a different procedure prevails. There may be a permanent Board of Appeals of twelve by whom all appeals are heard sitting in a body, though the attendance of all is not necessary. In associations covering a variety of allied trades it is the practice to have an Appeal Board of three persons, a broker, a dealer, and a merchant, all engaged in the particular line involved. In one association the president is limited to an approved list of about 200 members for his selection. The permanent Board of Appeal is favored because the older and more experienced men in the trade are selected for it, and experience gives them familiarity with the procedure and training in the use of judicial powers.

In a few associations the choice of arbitrators in the first instance is restricted. In the London Sugar Association the Council hears all arbitrations without a right to appeal. The Liverpool Cotton Association has 24 arbitrators who act in rotation. The parties do not know who will serve and the arbitrator sees only the cotton without knowing the parties concerned.

In most of the professional organizations the contracts provide that the president of the association shall appoint an arbitrator. The high standing of the executive is sufficient guaranty of a wise exercise of power. Some organizations publish an approved list of arbitrators as a guide to intending parties. Such a list is published by the Timber Trade Federation, in whose list each name is followed by a specification of the woods in which the man is expert.

In most arbitrations the procedure is regulated by the Act of 1889. In a schedule to the Act is a set of rules which govern the procedure. Section 2 of the Act reads:

"A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under submission."

The first two of these rules relate to the number of arbitrators to act:

"1. If no other mode of reference is provided the reference shall be to a single arbitrator.

"2. If the reference is to two arbitrators, the arbitrators may appoint an umpire at any time within the period during which they have power to make an award."

The arbitrators need not be named in the original agreement to arbitrate, which may have been made before the dispute arose; this is covered by the following clause in Sec. 27 of the Act:

"Submission means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not."

The general feeling among experts in arbitration is that a sole arbitrator is far better than two or three; when each side appoints its own arbitrator, he is very apt to feel that he must advocate the side he represents, instead of acting impartially, and that leaves it to the umpire or third arbitrator after all to give the deciding vote. However, many persons seem to feel their interests are better safeguarded if they are represented in the discussion by their own arbitrator, so the practice is very general to provide in the submission for each side to appoint its own. If the two disagree, they have power and it is their duty, to appoint an umpire to settle the matter. If they cannot agree on an umpire the Court will, on application, name one, or, in a trade arbitration, the association will do so.

As to the manner of presenting the case, the provisions are very brief. The arbitrators have power to administer oaths or take affirmations of parties and witnesses appearing (Sec. 7 of the Act), but if they consider it proper they may hear witnesses without oath (Rule 7 of the Schedule). Parties are bound, subject to any legal objection, to produce before the arbitrators

all books and documents which may be called for and to do all other things which the arbitrators may require (Rule 6 of the Schedule), and parties may obtain the presence of witnesses with or without documents by subpoena, just as in a trial at law (Sec. 8 of the Act).

These general phrases clothe the arbitrators with authority to conduct the arbitration pretty much as they see fit, and there is no general uniformity. In each of the trade associations, certain customs have been established, however, which are more or less followed. For instance, in some lines it is customary for the parties to write out their entire case and leave the arbitrators to find an award upon the documents submitted, without holding any formal meeting or hearing; in other lines the converse is the rule—there are no written statements, but everything must be orally presented; in still others these two are combined—after a written statement from each side the arbitrators call for evidence upon the controversial points, either orally or in writing. Some associations permit the parties to be represented by counsel; others discourage such representation. It is very usual, however, in either event, for parties to be assisted by their solicitors in getting up their case. When hearings are necessary they can be arranged to suit the convenience of the parties; out-of-town witnesses can be heard at the most convenient time for them; and generally the matter is so arranged that the parties feel free to present their case in their own way and in their own time. The check on any abuse of this is the increase in the fees payable to the arbitrators for their time and services.

In arbitrations upon quality of materials, there are generally neither written statements nor formal hearings; the arbitrators (if there are more than one) meet and compare a sample portion to a standard lot of the same material, and render their award, giving or refusing an allowance on the price and fixing the amount, if any; in this they are guided

solely by their knowledge of the material under discussion. This is the summary method followed in the thousands upon thousands of arbitrations which take place annually over consignments of wheat, rye, oats, oil-seed, timber, jute, hemp, sugar, coffee, ice, butter, meat, and innumerable other articles of commerce. Instead of lengthy correspondence, usually with persons oversea, or protracted litigation, these differences are settled in a few minutes or hours by experts who handle the actual material at the time of dispute, and not similar stuff or mere verbal descriptions some months or years later. These quality arbitrations in the trade associations are the most informal of any, as the object is to get the matter settled at once, as well as to get it settled at all. Business relations must go on, and they will go on more smoothly without outstanding differences. Arbitrations on other points are apt to be more formal, and they range all the way from a simple statement by each side, to all the formalities and complications of a lengthy trial, as in the big arbitrations on building contracts or on insurance claims which are held before celebrated King's Counsel who, if not actually judges, are in line for appointment.

The award must be final, it must be certain and not ambiguous, it must be possible, reasonable, and consistent and it must not call for the doing of an illegal act. If it does not conform to these requirements the Court has power to remand the matters to the reconsideration of the arbitrators, or it has power, if there has been some misconduct of the proceedings before award, to set the matter aside completely. However, a court will not lightly disturb the award, but will sustain it whenever possible, on the ground that the parties have chosen their tribunal and ought to abide by its decision.

The Act gives arbitrators large powers with respect to costs and they are permitted to fix their own fees. The trade associations usually require that the award be written on an official form, thus enabling the losing party to have a certificate which

can be passed back to the party from whom he bought the material in support of a claim for allowance. The loss may be passed through several successive hands until it reaches the person responsible for the defect.

Assistance From Court

There is no appeal from a final award in an arbitration. Many of the trade associations do, it is true, provide an appeal within the association, but that is merely a step toward finality—part of the proceeding—and at its conclusion the award is either upheld or altered and then is final. But while there is no appeal, strictly speaking, there is a method by which the opinion of the courts can be obtained upon certain points that come up in an arbitration. Any point of law that arises may be stated to the court for its decision. There are two ways in which this may be done: the arbitrator may do it in the course of the proceedings before him, or he may be ordered by the court to do so (under Sec. 19 of the Act), and then he must be guided in framing his award by the law applicable as defined by the court; or he may find all the facts and state his final award in the form of a case for the opinion of the court upon the question of law involved, or he may be ordered by the court to do so (under Sec. 7 of the Act). In the latter method he may, if he chooses, state his award in the alternative, depending upon the court's decision on the law; in any event, his part in the arbitration is completed when he states his award, and the court in framing its judgment will completely adjudicate the rights of the parties as based upon the facts found. From that judgment an appeal can be taken on up to the House of Lords. An opinion given under Sec. 19 is not a judgment, however, and therefore not appealable.

Appeals within the associations and applications to the courts on points of law are extremely few in proportion to the great number of arbitrations. The fees imposed on appeals and cases stated are severe for the purpose of discouraging such

action. For stating a case a fee of twenty-five guineas, or more, in the discretion of the Board of Appeal, is exacted, and from this a solicitor is paid for stating the case in proper legal form. The parties must then see to briefing counsel if they wish to have the point argued before the court.

A wide use of arbitration has also come about in recent years under proceedings specified in various new Acts. In some cases arbitration is optional, in some it is compulsory. Differences arising in the exercise of the power of public domain by public authorities and public utilities are invariably settled by arbitration, thus excluding from the courts a considerable volume of judicial business which in this country is dealt with in formal manner with judge and jury. Other statutes in the "compensation" group are the Housing of the Working Classes Acts, 1890-1909, the Housing, Town Planning, etc., Act, 1909, the Regulation of Railways Act, 1868, the Light Railways Act, 1896, the Metropolis Water Acts, 1872-1902, and there are many others.

A second group of statutes under which disputes are arbitrated contains recent Revenue Acts, introducing new schemes of taxation which give rise to many differences over the valuation of property. A third group includes new social legislation such as the Workmen's Compensation Act, 1906, under which all differences as to the amount of compensation payable to an injured workman or his dependents must be referred to arbitration. In these cases the county judge is usually selected as arbitrator but juries are unknown.

The trade associations do not account for all the arbitrations taking place in London. There are many lines of business in which arbitration clauses are habitually inserted in contracts not because of any association agreement or rule, but because of established custom and confirmed belief in the benefits of arbitration. A few of these lines of business are insurance, shipping, agriculture and building. An interesting instance of this class of cases is found in the arbitration of remuneration to be paid for salvage of vessels wrecked

anywhere in the world, under the Committee of Lloyds. Contracts for salvage present a hundred chances for dispute and the difficulty of prosecuting litigation before remote tribunals makes arbitration especially useful, aside from the expertness of the arbitrators obtainable in London. In this connection Mr. Rosenbaum, author of *Bulletin XII, A. J. S.*, mentions his attendance upon an arbitration between a Norwegian shipowner and an American contractor upon the salvaging of a vessel wrecked in the Caribbean Sea, when a dispute involving \$30,000 was adjudicated in one afternoon. In this business the Committee of Lloyds usually selects as arbitrator one of the half dozen or more of leading King's Counsel specializing in admiralty business. In insurance disputes and those arising in the building trade the practice is to appoint a leading barrister. A barrister who wins recognition as an authority in certain fields of commercial law is likely to have an assured income as arbitrator.

After considering all the lines of business in which contracts are standardized and more or less uniform, there is still a vast residue of business activities which consists of individual contracts made solely for the particular occasion. If these are written out, it is very rarely that an arbitration clause will not be found in them, and if they are not written out, it is the first instinct of the business man, if a dispute arises, to try and get a submission to arbitration from his opponent. The custom is firmly established, with the authority of common-sense and tradition behind it, and it extends down to the smallest dealings as well as up to those of stupendous magnitude.

An attempt extending over several decades to provide an arbitration tribunal for the general public by the London Chamber of Commerce has met with very little success. This is attributed in part to the competition from trade associations and in part to the fact that the rules do not permit the parties to select the arbitrator or arbitrators. So much hope for developing the practice in this country has

been based upon the so-called Court of Arbitration fathered by the London Chamber of Commerce that it is important that the meager success of the institution and the reasons therefor should be understood.

As to enforceability, the situation at present is that in England, under the Arbitration Act, a judgment may be entered on any award, whether that award is on an arbitration which took place in or out of England. Two parties might, therefore, enter on an arbitration in any country in the world, and the award could be taken to England and entered as a judgment, making property in England available for its satisfaction. The basis for this is that a submission to arbitration is a contract between the parties of which some of the terms are left to be supplied by the arbitrator, the submission and the award together constituting a complete contract which, by the Act, is given the effect of a voluntary confession of judgment. Few countries are as liberal in this regard as England, but English awards are, whether because of the local law or special treaty, enforceable in Germany, Denmark, Switzerland, Rumania, Brazil, Belgium, Sweden, Greece, Mexico and six of the self-governing British dependencies. It is curious that in practically all these cases an English judgment would be valid only as the basis for a suit leading to a local judgment, and vice versa, whereas an award may be reciprocally entered up at once as a judgment without further suit.

The English demand for swift justice led in 1895 to the creation of a special list in the King's Bench Division of the High Court of Justice which is popularly known as the Commercial Court. To this branch a judge specially versed in commercial litigation was assigned and a procedure was established which rivals that of arbitration in informality. The list was started under the able management of Mr. Justice Mather, "a judge intolerant of technicalities" who "swept away written pleadings and technicalities of every sort, coming straight to the point of every dispute and bringing the court into high favor with the London merchants who needed it."

The court has provided an ideal procedure and has met with a fair measure of success, but has not drawn back to the courts the volume of business which it was expected to. Arbitration has increased steadily in volume and the business of the Commercial Court has actually declined in recent years.

Advantages of Arbitration

One of the conspicuous advantages of arbitration lies in the obliteration of all questions of jurisdiction. It is quite impossible to conceive of any development of judicial procedure proper which could permit regular courts to compete with arbitration in this respect.

The greatest single advantage possibly lies in the fact that decisions are made by men trained to a degree of expertness which cannot be realized in any other manner than through intimate connection with a narrow and technical branch of business. The questions best suited to arbitration are those mainly of fact, such as questions of quality, quantity, condition, value and trade customs, and it is obvious that a better approximation to the truth can be made by a specialist of his own knowledge than by a jury at second hand. Even a judge is inferior for this purpose, supposing the jury is dispensed with; he would often have to decide between conflicting testimony of experts before even selecting the standards with which to approach the decision of a specified question of commercial fact. Even the organized court which is able to assign a judge versed in commercial law and usages to a special branch is at a disadvantage compared with the more specialized and differentiated knowledge of business men who keep in touch, collectively, with a hundred or more lines of trade. The difficulties which we realize in admiralty and patent litigation, and other classes of causes in which much reliance must be placed upon expert testimony, based largely on hypothetical questions, illustrate this disadvantage.

Another great advantage of arbitration over the law courts is in the matter of

procedure. The procedure is flexible and can be adapted to the convenience of the parties and the character of the dispute heard. The meetings can be set for a fixed time and place, suitable to all parties, so that they do not have to sit in a court room watching a trial list drag on while their time and patience are exhausted; and the hearings can be held as soon as the parties are ready to go on, instead of after they have waited for weeks or months while a court disposes of an over-crowded docket. When the hearing begins, if it is to be lengthy, it can be arranged that the case is heard piecemeal—all the plaintiff's witnesses one day and all the defendant's another, or all the out-of-town witnesses as soon as they arrive, or any other satisfactory arrangement, which no court would permit. Next, in presenting evidence, the rules of evidence (which are a tribute to the contempt of the law for the intelligence of juries) present no obstacle, but the arbitrator is entirely free to use his judgment as to what is credible and what is not; parties are free to waive any technical rule which they do not consider it necessary to enforce, and are more willing to do so when they are gathered in an arbitration room than when they face each other across a court. The evidence, too, is apt to be fresher, as the hearing can take place while all the persons to be heard remember all the matters vividly, or while the goods or property are still in the condition complained of. This is especially important in seasonal trades, where there is a rush of business at certain months in the year and a lull at others; the disputes arising out of one season's business can be cleared off and settled before the minds of the parties are distracted by the next season's effort. Again, there is no opportunity for the many technical interlocutory applications and appeals which courts allow; parties feel they must present their whole case and get the dispute settled, as the award is final.

In the fourth place there must be considered the beneficial effect of the flourish-

ing condition of arbitrations upon the English business community. This shows itself in several ways. The first is that it has been found that the presence of an arbitration clause in a contract is more potent in warding off disputes than it is even in settling those that arise; the parties know that any dispute arising will be settled quickly and efficiently, and that prevents either of them who might be inclined, from picking trouble with the other for the sake of delay; it is the common experience of both law courts and arbitration rooms that a speedy trial is the worst enemy of litigation, and usually the defendant, if he knows he will suffer judgment at once, will try to save the costs. But apart from this, the presence of the arbitration clause gives the parties the feeling that they are not enemies or dealing at arm's length; the very fact that they agree beforehand to settle differences in an amicable way paves the way to an understanding, even in case of a difference, which makes a formal arbitration unnecessary. On the other hand, there are bona fide differences founded on conviction or fact, which no amount of mere good feeling will settle; often a business man is obliged to swallow these because "going to law" is, as he has discovered, too slow, too expensive and too much of a gamble; the possibility of arbitration, however, gives him an opportunity to claim his rights in even a small matter, and the result is a healthier condition in which there is no cause for bearing grudges or for grumbling because of injustice for which there is no redress. Finally, if an arbitration does take place, there is apt to be much less of that irritation and bad feeling between the parties which a trial at law engenders, with its publicity, its artificial hostility between counsel, and its traditions of the medieval tournament. No better evidence could be adduced of the general attitude of settlement and co-operation created by arbitration than the quasi-negotiability of some awards in ar-

bitration; each party in the chain of purchasers will honor the award and so it passes back to the original producer eliminating a lawsuit at each link of the chain.

The mutual and voluntary character of submissions to arbitration are in direct contrast to the compulsory nature of court litigation. In the law the rendering of exact justice in the matter at bar is a final aim. But in business the settlement of a given dispute is not ordinarily the most important thing. The big thing is the relationship between the parties. In its formal tribunals the law must ignore this preservation of relations between the parties, however momentous.

The voluntary character of arbitration affords a basis for successful continuance of business relations. Arbitration is thus seen as a constructive social function weaving into the fabric of commercial life to strengthen rather than sever its threads.

Arbitration, starting as an expedient, a makeshift, and in competition with the

courts, has proved indispensable. Courts can never hope to acquire its virtues or to lessen its scope. The competitive element is disappearing. We can now look upon arbitration as being, not a makeshift, an irregular method of adjudication, but as a modern practice supplementing the field of official adjudication and making with the courts a more complete means for accomplishing a necessary work.

New ways of living and transacting business imply new machinery in the law. Society is constantly devising new tools to accomplish its work more economically. Private undertakings of a public nature are taken over, after a period of probation, and made part of government and law. Encouragement of arbitration is to be based on its own inherent worth, and with no thought that it will lessen the obligation now resting upon American courts to perform their work more efficiently. The two lines of advance can be made simultaneously and without jealousy.

Arbitration in United States

The foregoing sketch of the history of Commercial Arbitration in England indicates that this mode of adjudication is based upon a high degree of organization in the business world. It is only in recent years that American business has become organized and we have nowhere such a concentration of commercial activities as exists in London.

Success in arbitration depends a great deal upon mutual confidence and its practice needs to be encouraged and nursed along by trade organizations which possess some influence or control over individual traders. Once established it persists and grows even though the courts endeavor to match its best features of promptness, simplicity of procedure and economy.

In recent years a wonderful change has come over the business world in this coun-

try. Most lines of trade are now well organized. In scores of cities there is a measure of concentration. The field is ripe for developing voluntary modes of adjudication.

In New York City the Chamber of Commerce has, for several years, been active in encouraging arbitration. In fields of business in which organization is most thorough, notably stock and produce exchanges, arbitration has fully met the needs of members for a number of years. In the building trades in certain cities, owing to the entire unfitness of traditional methods of court procedure, arbitration has been practiced with entire success.

Another favorable environmental element has been supplied by the war and the sudden expansion of foreign trade. Foreign customers have learned of arbitration through trading with London, Paris,

Hamburg and other European cities. If it were only for the advantages accruing on jurisdictional grounds there would be sufficient incentive for resorting to arbitration.

So, in recognition of this need and the present opportunity, the International High Commission over two years ago brought about an agreement for arbitration between the Chamber of Commerce of the United States of America and the Chamber of Commerce of Buenos Aires.

The New York State Bar Association has a committee on Arbitration, growing out of its Committee on the Prevention of Unnecessary Litigation. It has established a long list of lawyer arbitrators, members of the Association, who are prepared to serve parties litigant.

The Credit Association of the Building Trades of New York, 120 Broadway, has made a marked success of arbitration. In a circular dated May 15, 1917, the method and results are concisely set forth. The Association follows original methods in bringing disputants together, whether both are members, or only one. The circular contains a record of work accomplished at a single meeting of the Executive Committee, which is highly illuminative. Among testimonials from members the following are especially quotable:

"We are more than pleased with the results and find that you have been a positive help and saving to us. Unlike courts of law, the Association leaves no bad taste. The propositions all seem to be handled with reasonable speed."

Bramhall-Deane Co., New York.

"Cooperative protection that insures having to do just what the contract calls for and also insures adjustment of disputes is a necessity. If each branch of the building industry were fully represented, there would be an automatic entire disappearance of the abuses in the trade, and one would feel that the millenium had arrived."

Craig and Brown, Brooklyn.

The Association has the following to say concerning the work:

"In the process of the investigations a large number of the complaints were found to be due to natural and honest differences

of opinion with respect to the customs of the trades, interpretations of contracts, etc. In such instances it was only fair to establish a practice of inviting the parties against whom the complaints were lodged to agree to submit the disputes to the decision of our Executive Committee acting as an Arbitration Committee. Furthermore, it often transpired that an actual delinquent on finding that his oppressive and unfair dealings were about to be exposed through the relentless investigations, would at such stage almost invariably agree when represented at our hearings, to leave the decision of the case to the Committee. This willingness, besides being prompted by the natural feeling arising in men's minds when actually confronted by the influence of a Board of Conciliation, is increased on learning that arbitration will be decided by representative individuals in the industry who know many times more about building matters than men selected haphazard to serve as jurors in court cases. That the arbitrations are free from red tape and free from cost, also influences the agreement to abide thereby.

"Thus there has developed in our Association an arbitration service of unusual dimensions, highly respected by the non-members and enthusiastically favored by those members who have used it or have taken part in it as occasional members of the Committee.

"The addition of this arbitration and conciliation work to the labors of the Executive Committee has compelled it to be many times more active than the average governing board. To convey an idea of the enormous amount of work done, we have but to mention that 253 controversies were attended to by this Committee last year. This year's increased activity amongst the members, largely through the advertisement of this single feature of our efforts, is such that one or other of the three divisions of the Executive Committee is meeting every week and the number of controversies being handled is at the rate of 700 a year.

"It is desired to impress all with the fact that these hearings are entirely free from red tape; no legal documents are prepared or time wasted, yet the results are highly successful; and, best of all, neither party pays a cent of expense. This informal arbitration service is free to every member and his customer. The Committeemen contribute of their time and talent for the good of the cause."

Progress in Illinois

The Chicago Association of Credit Men became active in promoting arbitration

about two years ago. They induced the legislature to revise the Illinois arbitration statute to conform to modern needs and especially to embrace an idea advanced by Chief Justice Harry Olson of the Municipal Court of Chicago.

The insistent need of the court (which has unlimited contract jurisdiction, and in which nearly all contract litigation in Cook County is tried) for a saving of time, was entirely consistent with the arbitration movement. Chief Justice Olson saw an opportunity for linking the court with arbitration in a way beneficial to both. Arbitration, with its expert triers of questions of fact, was seen to be positively superior to court procedure with its uninformed jurors and their reliance upon expert witnesses. The weak spot in arbitration appeared to be when mixed questions of law and fact were involved and recourse would need be had to a court if the questions of law were to be expertly disposed of.

This difficulty has been met in a way in England, but Chief Justice Olson believed a more direct and simple cooperation could be worked out. So the revised act was drafted with this in view, and under it questions of law are readily submitted to a court having jurisdiction of the subject matter. He announced preparedness to assign *ad hoc* for prompt disposition a judge of special qualifications. Under this system the court works hand in hand with arbitrators and the system promises to result in a very complete and perfect service.

It may be well at this point to print the Illinois revised act in full. It was adopted by the 1917 Assembly and took effect July 1, 1917.

An Act to revise the law in relation to arbitrations and awards.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: [Scope and Manner of Submission.] That all persons having requisite legal capacity may by an instrument in writing to be signed by them submit to one or more arbitrators to be named in the manner indicated by such writing, any controversy existing between them, and

may, in such submission agree that a judgment of any court competent to have jurisdiction of the subject matter of such instrument, shall be rendered upon the award made pursuant to such submission.

Sec. 2. [Procedure.] The parties to such submission may by such submission designate the number of arbitrators, which number may be one or more as the parties shall agree; the manner in which they may be appointed in the first instance and vacancies caused by the refusal, incapacity or death of an appointee filled; the time and place of the hearing and the rules for the hearing of such controversy, not in conflict with the provisions of this act; the parties to such submission may include by reference in said written submission the published rules of any organization or association which rules shall thereby become a part of the contract of submission.

Sec. 3. [Submission Irrevocable.] A submission to arbitration shall, unless a contrary intention is expressed therein, be irrevocable.

Sec. 4. [Subpoenas and Witnesses.] Said arbitrators or any of them shall have the power to administer oaths, subpoena and examine witnesses, to issue subpoenas *duces tecum* requiring the production of such books, papers, records and documents as may be evidence of any matter under inquiry and to examine and inspect the same; service of such subpoena shall be made by any sheriff or constable or other person; the fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the circuit courts of the State; any court of this State, having jurisdiction of the subject matter of the submission or any judge thereof upon the application of such arbitrators or any of them, either in term time or vacation may compel attendance of witnesses, the production of books and papers and giving of testimony before said arbitrators by attachment for contempt or otherwise in the same manner as the production of evidence may be compelled before said court.

Sec. 5. [Depositions.] The said arbitrators may authorize the taking of depositions without a commission in the same manner as may be provided by law for the taking of depositions in suits pending in courts of record of this State.

Sec. 6. [Opinions of the Court on the Law.] The arbitrators may, of their own motion and shall by request of a party

(a) at any stage of the proceedings submit any question of law arising in the course of the reference for the opinion of the court stating the facts upon which the question

arises and such opinion when given shall bind the arbitrators in the making of their award

(b) state their final award as to the whole or a part of the reference in the form of a conclusion of fact for the opinion of the court on the questions of law arising and such opinions shall finally conclude the proceeding, except as by this act otherwise provided.

Sec. 7. [Award—Form—Partial Award.] The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, make a partial award or awards, which shall be enforceable in the same manner as the final award; upon the making of such award, the arbitrators shall deliver a true copy thereof to each of the parties thereto without delay.

Sec. 8. [Filing of Award.] If either of the parties neglect to comply with any partial or final award, made by the arbitrators, the other party may, at any time within one year from the time of such failure, file such award, together with the submission in court.

Sec. 9. [Judgment on Award.] The party filing such award may, by giving ten days' notice of his intention to the opposite party, and if no legal exceptions are taken to such award, have judgment thereon, as on the verdict of a jury; upon any legal exceptions taken, the findings of fact by the arbitrators shall be conclusive; successive judgments in the same case may be entered on successive awards of the arbitrators on the subject matter of the submission together with the costs of arbitration and the court, and execution may issue as in other cases.

Sec. 10. [Enforcement of Award.] When the award requires the performance of any act other than the payment of money, the court rendering such judgment shall enforce the same by rule, and the party refusing or neglecting to comply with such rule may be proceeded against by attachment or otherwise as for a contempt.

Sec. 11. [Setting Aside or Remitting Award.] If any legal defects shall appear in the award of such proceedings, or if it shall appear that the award is not sustainable under the opinions of the court upon questions of law under section 6 of this act, the court may set aside such award, or remit the matters contained in the said award to their consideration of the said arbitrators; or if it shall appear, on oath or affirmation that said award was obtained by fraud, corrup-

tion or other undue means, or that such arbitrators misbehaved, said court may set aside such award.

Sec. 12. [When Court May Correct Award.] If there be any evident miscalculation or misdescription, or if the arbitrators shall appear to have awarded upon matters not submitted to them, not affecting the merits of the decision upon the matters submitted, or where the award shall be imperfect in some matters of form, not affecting the merits of the controversy, and where such errors and defects, if in a verdict, could have been lawfully amended or disregarded by the court, any party aggrieved may move the court to modify or correct such award.

Sec. 13. [When Motion to Set Aside, or Modify, Must Be Made.] Applications to set aside, modify or amend or remit such award, as provided in sections 11 and 12 of this act, must be made before the entry of final judgment on such award: Provided, nothing herein contained shall be so construed as to deprive courts of chancery of their jurisdiction, as in other cases.

Sec. 14. [Errors and Appeals.] Writs of error and appeals may be taken from any decision of the court upon questions of law under section 6 of this act, or matters arising in the course of the proceedings, by the party feeling himself aggrieved, as in other cases; and if the case shall be upon such writ of error or appeal remanded, such further proceedings shall be had as the nature of the case may require.

Sec. 15. [Compensation—Fees.] The parties may, in the submission, agree upon the amount of compensation to be paid to the arbitrators and the terms of the payment of the same; unless so agreed, each arbitrator shall be allowed, for every day's attendance to the business of his appointment \$3.00, to be paid in the first instance by the party in whose favor the award shall be made, but to be recovered of the other party with the other costs of suit, if the award or final decision shall entitle the prevailing party to recover costs. Sheriffs, constables, the bailiff of the Municipal Court of Chicago, clerks and justices of the peace shall be entitled to the same fees for services performed in relation to any arbitration, as shall be allowed by law for the like services in their respective courts.

Sec. 16. [Arbitrators Compelled to Duty.] Arbitrators may be compelled, by order of the court, to proceed to a hearing of the submission, and to make report without unnecessary delay.

Sec. 17. [Definitions.] In this Act unless the context or subject matter otherwise requires,

"Court," means the court named in the

submission, and if no court be named, any court having jurisdiction of the subject matter, to which application is made or proceedings had on a submission.

"Submission" means a written agreement to submit differences to arbitration, whether such differences be in whole or in part in suit or not in suit.

Sec. 18. [Repeal.] An act to revise the law in relation to arbitrations and awards, approved April 29, 1873, in force July 1, 1873, except as herein re-enacted, is hereby repealed, but this section shall not be construed so as to affect any right, actions or causes of action that may have accrued or be pending when this act shall take effect.

In Chicago the work begun by the Credit Men's Association has been taken over by the newly formed Central Committee to Promote Commercial Arbitration, of which Chief Justice Olson is chairman and Abram E. Adelman, Esq., 1518 Ashland Block, is secretary, and the following are members:

R. B. Beach, general manager, Chicago Association of Commerce.

John R. Mauff, secretary, Board of Trade of Chicago.

H. H. Merrick, general manager of credits, Armour & Company.

M. S. Green, credit manager, Consumers Company.

C. W. Woodward, manager, Chicago Building Material Credit Bureau.

C. R. Dickerson, secretary of Chicago Association of Credit Men.

Herbert Harley, secretary of American Judicature Society.

H. W. Hardy, treasurer, Libby, McNeill & Libby.

Sol Westerfeld, vice president, National Association of Retail Grocers.

The Central Committee operates by sending to trade associations an explanation of the advantages of arbitration and by requesting them to adopt a resolution like the following:

WHEREAS, the revised Arbitration Act of the State of Illinois provides a simple and practical method for adjudicating controversies arising in the course of business without the delay and expense attending court procedure, and without disrupting the relations existing between the parties to the controversy; and

WHEREAS, steps are being taken to encourage the practical and widespread use of

arbitration, and this Association has been invited to participate and co-operate, therefore,

BE IT RESOLVED, that this Association establish a Committee on Arbitration with power to supervise arbitrations between its members, and between members and other persons, to promulgate a list of arbitrators, to co-operate with the Central Committee to promote Commercial Arbitration, and to adopt rules of arbitration, the first members of the Arbitration Committee are Chairman and (insert four names)

The Secretary is hereby directed to notify said Central Committee of this action, at the earliest possible date.

When Secretary Adelman receives notice of the adoption of such a resolution he supplies the association with enough copies of a folder to supply all their members with practical information.

The Central Committee recommends to the associations adopting the practice the following form of submission after a dispute has arisen:

Know all men by these presents, that, whereas, a controversy exists between us, the undersigned parties to this instrument, which briefly stated, is as follows:

..... That we, the undersigned, do hereby submit the said matter of controversy to arbitration, under the laws of the State of Illinois and the rules of the Central Committee to Promote Commercial Arbitration, of Chicago, Illinois, which are hereby incorporated in this submission.

In witness whereof, the parties hereto have hereunto set their hands and seals this day of, 191..
..... (Seal)
..... (Seal)

For use in contracts the following form of submission is recommended:

All disputes at any time arising under, out of, in relation to, or in connection with this contract, or its construction or fulfillment, which the parties in interest may be unable to settle between themselves, shall be referred to arbitration under the laws of the State of Illinois and the rules of the Central Committee to Promote Commercial Arbitration, of Chicago, Illinois, which are hereby incorporated in this contract.

The following associations have adopted arbitration under the invitation extended:

Master Plumbers' Asso. of Chicago.
 Paint, Oil and Varnish Club of Chicago.
 Chicago Grocers' and Butchers' Asso.
 Chicago Produce Trade and Credit Asso.
 Chicago Face Brick Asso.
 North Side Commercial Asso. of Chicago.
 Wholesale Florists' Credit Asso. of Chicago.

American Asso. of Creamery Butter Manufacturers.

National Asso. of Advertising Specialty Manufacturers.

The Chicago Board of Trade has employed arbitration with entire success for over fifty years. Indeed, no other method would avail in adjusting disputes between members of a trading association of this kind.

The Central Committee is continuing its missionary work and also stands ready to assist in actual arbitrations when called upon. It recommends the adoption of the following standard rules of procedure which have been drafted to fit the Illinois statute:

ARBITRATION RULES AND REGULATIONS

of the

CENTRAL COMMITTEE TO PROMOTE COMMERCIAL ARBITRATION

of Chicago, Illinois.

I.—GENERAL.

RULE 1.

The following rules, except so far as they are expressly varied by the terms of the submission, are deemed to be incorporated in every submission to arbitration under the rules of the Central Committee to Promote Commercial Arbitration.

RULE 2.

If reasonably possible the work, acts, deliveries or payments called for by a contract out of which there arises a dispute for arbitration, shall continue during the arbitration proceedings, without prejudice to the right of either party to succeed; perishable goods may, at the discretion of the arbitrators, be sold for the best price obtainable and the proceeds shall stand in their place.

RULE 3.

No right of action upon any differences referred to in a submission to arbitration shall arise until after reference and award, and the obtaining of an award by arbitration shall be a condition precedent to the right of any party to sue another in respect of any claim arising out of such differences.

RULE 4.

The arbitrators have jurisdiction to decide a dispute as to whether or not a contract has been made.

RULE 5.

If the arbitration is upon differences which are the subject of a pending lawsuit, matters and persons outside the lawsuit may be included in the reference.

RULE 6.

Death or insolvency of a party shall not revoke an agreement to arbitrate or an arbitrator's authority, but the arbitration shall be proceeded with by the party's legal personal representatives.

II.—SERVICES OF LOCAL COMMITTEE AND CENTRAL COMMITTEE.

RULE 7.

When there has been an agreement to submit future differences to arbitration, either party may, upon the occurring of any dispute, apply to the Arbitration Committee of his Association, or to the Central Committee to Promote Commercial Arbitration, for its services. With such application he shall file a copy of the arbitration clause in the agreement, and shall make a deposit of such sum as the Committee shall require, to be disbursed by the Committee for his account in payment of arbitrators or other fees and expenses. The Committee shall thereupon notify the adverse party of the application, calling his attention to Rule 16 of these rules, and requesting a deposit of the same amount.

RULE 8.

When the agreement is to submit existing differences to arbitration the agreement shall be filed together with a deposit as required in the preceding rule.

RULE 9.

The Committee to which application is made shall co-operate with parties to ar-

bitration in obtaining the appointment of arbitrators, and shall send out notice of such appointment to the parties interested. The said Committee shall also send out notices of all meetings and hearings in the arbitration at least three days in advance to the arbitrators, parties, witnesses and others entitled to attend, and shall deliver such papers as it is required by these rules to deliver.

RULE 10.

Any notice to a party may be mailed to him at his principal place of business.

RULE 11.

In case of any question concerning the interpretation of these rules, the decision of the Central Committee to Promote Commercial Arbitration shall be conclusive.

RULE 12.

The Arbitration Committee of any trade or Association, and the Central Committee to Promote Commercial Arbitration shall fix a scale of fees payable for their services in connection with the course of an arbitration, and for the payment of arbitrators.

III.—ARBITRATORS.

RULE 13.

If no other mode of reference is provided, the reference shall be to one arbitrator, but the parties may agree in writing that the reference shall be to three arbitrators, one named by each party and the third named by those two.

RULE 14.

The appointment of an arbitrator shall be made in writing, signed by the party appointing, and filed with the Local Association or the Central Committee, in case its services have been called upon, together with any proof of power to appoint.

RULE 15.

If the reference be to two arbitrators, the two arbitrators may appoint a third arbitrator before entering upon the reference.

RULE 16.

In any of the following cases:

- (a)—If either party fails to appoint an arbitrator, either originally or to fill

the vacancy caused by the refusal, incapacity or death of an appointee;

- (b)—If the parties or two arbitrators fail to concur in the appointment of a single arbitrator, either originally or to fill the vacancy caused by the refusal, incapacity or death of an appointee;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint (or concur in the appointment of) an arbitrator.

If the appointment is not made within seven business days after the service of the notice, the Committee of the Local Association or the Central Committee to Promote Commercial Arbitration may, on application by any party in interest, appoint an arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

RULE 17.

No person who has any financial interest in any of the parties to an arbitration, or in the subject matter of the arbitration, shall be eligible to be an arbitrator in the arbitration.

Before entering upon his duties each arbitrator who may have been appointed under these rules shall take the following oath:

OATH OF ARBITRATOR.

State of Illinois, }
County of Cook, } ss.
City of Chicago. }

I,.....who have been appointed arbitrator by the above instrument of submission to arbitration, being duly sworn on oath say that I will faithfully and fairly hear, examine and determine the cause and controversy mentioned in the foregoing instrument of submission to arbitration, according to the principles of equity and justice, and make a just and true award to the best of my understanding.

Subscribed and Sworn to before me thisday of.....A. D. 191....

IV.—PREPARING FOR HEARING.

RULE 18.

Within 7 days after the naming of an arbitrator by or for him, the party applying for arbitration shall write out a clear and concise statement of what he claims, which, together with a copy of any contract, corres-

pondence or vouchers relating to the same, shall constitute his claim; and shall forward to the Secretary of the Local Association, or its Arbitration Committee, or of the Central Committee, if said Committee shall have been called upon, copies of his claim in number sufficient for said Secretary to deliver one to the adverse party and one to each arbitrator.

RULE 19.

Within 7 days after the receipt of the claim the adverse party shall write out a similar statement, which shall constitute his answer, and he shall forward to the said Secretary copies of his answer in like manner for the like purpose.

RULE 20.

When the claim and answer have been delivered, or the time has elapsed when they ought to be delivered, the arbitrators shall fix a time for a preliminary meeting, of which notice shall be sent to all parties. At this meeting the arbitrators shall indicate, either at their own instance or at the request of a party:

- (1)—Upon what points, if any, they will require a fuller statement.
- (2)—Upon what points, if any, they desire to hear evidence.
- (3)—The manner in which the evidence shall be given.
- (4)—The times and places for hearings, if any.
- (5)—Any other directions as to the form and course of the proceeding.

V.—HEARING.

RULE 21.

The evidence in an arbitration may be taken and the proceedings shall be conducted in a mercantile way without regard to legal technicalities.

RULE 22.

Arbitration hearings shall be considered private, and no person shall be admitted without the consent of the parties, except the parties, their legal advisers, witnesses, and a representative of the Association whose Committee may have said hearings in charge, and no statement shall be given out to the press without the consent of both parties.

RULE 23.

Personal attendance of parties may be dispensed with if they agree to state their case

completely in writing, either jointly or separately, and agree to accept the decision of the arbitrators on such statement. In such case the arbitrators may nevertheless call for additional evidence, unless the parties desire that no further evidence shall be taken.

RULE 24.

No hearing shall proceed in the absence of any arbitrator.

RULE 25.

If either party remains absent from a hearing, the arbitrators may, after adjournment and due notice to him, if he still remains absent, proceed in his absence.

RULE 26.

If either party intends to be represented by counsel at any hearing he shall give the adverse party at least 3 days' notice of his intention.

RULE 27.

The parties may agree that the evidence shall be given wholly or in part by affidavit.

RULE 28.

The arbitrators may, if they consider it necessary, order that any witnesses on a reference shall be examined on oath or affirmation.

RULE 29.

The arbitrators shall have power to obtain, call for, receive, and act upon, any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not) as they may think fit, and may order production of documents by one party for inspection by another at any time either before or at the hearing.

RULE 30.

In cases of technical difficulty a legal or other expert may be selected by the arbitrators to sit with them in an advisory capacity, or to testify as a witness at the hearing, or to assist them in framing their award.

RULE 31.

A stenographic report shall be made of such part of the proceedings as the arbitrators may deem necessary.

RULE 32.

Subject to these rules the arbitrators shall have full control over the procedure and the mode in which the arbitration shall be conducted.

VI.—POINTS OF LAW.**RULE 33.**

In the following rules "Court" means the Municipal Court of Chicago, or any judge or branch thereof specially delegated to deal with arbitrations.

RULE 34.

The arbitrators may, of their own motion or by request of a party—

(a)—At any stage of the proceedings submit any question of law arising in the course of the reference, for the opinion of the court, stating the facts upon which the question arises and such opinion when given shall bind the arbitrators in the making of their award;

(b)—State their final award as to the whole or a part of the reference in the form of conclusions of fact for the opinion of the court on the questions of law arising and such opinion shall finally conclude the proceeding; subject only to any right of review permitted by law.

RULE 35.

The arbitrators shall have power, on behalf of the parties or any of them, to do all things necessary under the rules of the court for obtaining such opinions, including power to authorize the filing of any statement or any agreed case, and the entry of any appearance.

RULE 36.

Upon the consideration by the court of any question of law submitted under the previous rule the finding of facts by the arbitrators shall be conclusive.

RULE 37.

Each party reserves the right to revoke the authority of the arbitrators to act for him in the arbitration if, after request, they refuse to take steps to obtain the opinion of the court upon any point of law as provided in these rules.

VII.—AWARD.**RULE 38.**

The arbitrators shall make their award in accordance with their own sense of the equities of the case, taking into consideration such trade customs and usages as may be applicable thereto.

RULE 39.

The award to be made by the arbitrators must definitely deal with all matters of difference in the submission requiring settlement, and it shall be binding on the parties and the persons claiming under them respectively, subject to any right of review permitted by law from a judgment entered on the award.

RULE 40.

The arbitrators shall make their award within one month after entering on the reference, unless within that time they give written notice to all parties naming an extension of time for making the award.

RULE 41.

The award shall be in writing and signed by the arbitrators concurring in it.

RULE 42.

When three arbitrators are appointed an award shall be valid which is concurred in by any two of them.

RULE 43.

Arbitrators need not sign arbitration documents in the presence of each other.

RULE 44.

The arbitrators may at any time, if, in their opinion, the circumstances require it, make a partial award, expressly reserving any further questions in the reference for a further award or awards by them.

RULE 45.

The award shall be deposited by the arbitrators with the Secretary of the Local Association or of the Central Committee, and a copy of it shall be delivered by the said secretary to each party.

RULE 46.

Any submission to arbitration or award

thereon may be filed or made an order or rule of, and judgment thereon may be entered in, any court in which it is sought to enforce an award.

RULE 47.

For the purpose of entering judgment the appointments of arbitrators, the claim and the answer, shall be deemed to be incorporated in the submission to arbitration.

VIII.—COSTS.

RULE 48.

The costs of the reference and award shall be completely in the discretion of the arbitrators who may direct by whom, and to whom and in what manner those costs or any part thereof shall be paid, and may settle the amount of costs to be so paid or any part thereof.

RULE 49.

In deciding as to costs the arbitrators shall take into consideration the correspondence between the parties relating to the dispute, and their respective efforts to arrive at a fair settlement.

RULE 50.

The parties to any arbitration agree to be jointly and severally liable for all expenses properly incurred in the course of the proceedings, and to indemnify the Association having same in charge against any loss or liability of any kind arising directly or indirectly out of the arbitration.

Simplified Federal Procedure

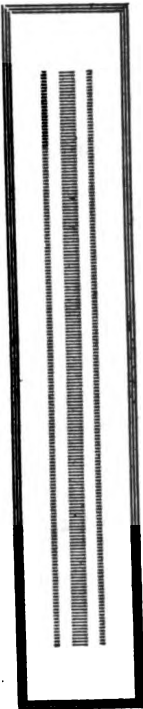
While the pressure of more important concerns has deferred action on the bill authorizing the Supreme Court to adopt rules regulating the procedure in actions at law in the federal courts, the issue has been squarely raised by the majority report of the Senate Committee on Judiciary in favor of the plan and the minority report opposing it, and action on the bill at the next session is to be expected. Since a measure of presumption in favor of the

bill arises from the indorsement of the American Bar Association, it is interesting to note the objections urged by the minority. Primarily the minority report advocates the principle embodied in the Conformity Act, urging the inconvenience to the lawyer who is compelled to observe one system of procedure in the state court and another in the federal court. To this it may be answered that while a large number of the states have abolished the distinction between law and equity procedure, equity practice is conducted in the federal courts under rules prescribed by the Supreme Court. The advantage of the change to an attorney whose practice extends into the federal courts of several states is minimized by the minority, who say: "Not one lawyer in a hundred ever goes beyond the bounds of his state to try a lawsuit." This is true enough perhaps as it is stated, but it certainly is not true that ninety-nine out of a hundred of the cases in federal courts are tried by attorneys resident in the state where the court is held, and that is the real point at issue. For instance, there are 198 cases reported in volume 240 of the *Federal Reporter*. In 45 of these, or approximately one in four, counsel residing in two or more states appeared. The suggestion that attorneys having federal business in states will "associate some local firm familiar with the other practice of the state" smacks somewhat of trade union ethics. Meanwhile no thought is taken of the judges of the federal Appellate Courts. A table prepared by a member of the Bar Association shows that in a three months' period taken at random over 49 per cent of the points decided by the federal courts related to practice. Aside from the crying need for a better system of practice which this discloses, it means that the judges of the Circuit Court of Appeals must spend much of their time in passing on practice questions arising under ten or a dozen separate systems. The waste of judicial time involved is obvious and is of itself a strong reason for a uniform federal procedure.—*Law Notes*, November, 1917.

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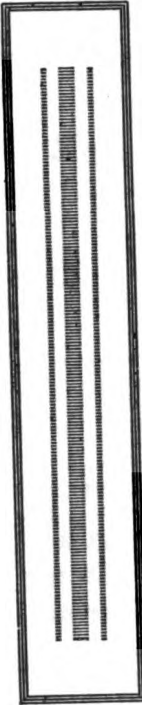
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Editorial

There is no lawyer in the country better qualified by study and experience to write on "Principles of a Modern Procedure" than Judge Adolph J. Rodenbeck, whose work in the field of procedure reform in New York is to be found in the elaborate reports of the Board of Statutory Consolidation. His article in this number under that title deserves consideration by every lawyer and judge, and by every legislator, too. His clear analysis and compelling logic will give impetus to the movement for the control of procedure through rules of court and assist materially in leading us from the morass of legislated procedure with all its train of evils. We will resist the inclination to quote especially forceful expressions and commend the article to our readers unreservedly.

The lawyer has been scolded and exhorted so long that he would feel neglected if his critics should cease. But nobody has ever suggested the practical steps to be taken to enable him to work out his salvation. The time has come to stop moralizing and consider a definite plan for integrating the bar so it can realize its highest ideals.

It is obvious that the solution must come through some form of bar organization and it seems plausible that the plan should begin where the present organizations leave off. The forty-seven state bar associations are of comparatively recent origin. They have had to oppose untoward circumstances to reach the point of minority representation now occupied, incomplete though it is. The radical thought which largely controlled affairs in the early decades of our national history was distinctly hostile to the idea of a legal profession. The doctrine was that the law should be so simple that any man could know it and any man could administer it as a judge.

This bolshevik doctrine utterly failed to prevent the growth of a bar equal in numbers at least to those of older nations, and it utterly failed to keep the lawyers from dominating civic affairs from one end of the land to the other. But it was effective in preventing lawyers from attaining professional solidarity. Our bar has never been *integrated*. It has possessed no definite legal obligations and no definite professional powers, as a bar. Naturally, attempts to hold it to a transcendental standard by criticism and coaxing have largely failed.

The prejudice against a strong, self-governing bar operated through low standards for admission. Although only one state has enshrined in its constitution the ideal that every man should be permitted to be a lawyer and a potential judge, yet in all the states, until quite recently, requirements for admission were so low that there was no practical check upon the entrance of any person, however unfit, who made a moderate effort.

In nearly all the states there are many professional misfits who have consistently opposed higher standards for admission, and who do so yet. They have consistently opposed that integration of the bar which would facilitate self-discipline, and they do so today.

The most important point, perhaps, is not the distance which has been travelled by the legal profession up to this time, but the present direction of travel. This direction in most states is encouragingly upward and forward. Such progress as has been made has been mainly in the past two decades. It is represented by better legal education, higher requirements for admission, discipline through grievance committees of bar associations and the development of ethical rules through actual cases decided by ethics committees.

But there still remains, by confession of the leaders of the profession as well as by the aspersive attitude of press and public, a long way to travel before the profes-

sion becomes what it must be if it is to fulfill its necessary role in government and society, before it can be most effective in its monopoly of administering justice through bench and bar, and before it can win the full measure of respect and confidence which an efficient and conscientious bar will merit.

A great impetus can be given to the forward movement by supplying the profession with that organic entity which will keep continually before it the opportunity for higher service and afford the practical means for registering and executing the will of its members. The model bar association act submitted in this number of the JOURNAL is offered as a contribution to the stock of ideas in this field.

Principles of a Modern Procedure

By Adolph J. Rodenbeck, Justice of the Supreme Court and Former Chairman of Statutory Consolidation of the State of New York.

The committee to suggest remedies and to formulate laws of the American Bar Association properly divided the main factors of judicial administration into (1) the judicial organization, (2) the law of procedure, (3) the personnel, mode of choice and tenure of judges, and (4) the organization, training and traditions of the bar.¹

This article, which is a summary of experience acquired in preparing a revision of the code of civil procedure of New York, deals only with the law of procedure. It embodies the general principles that have been applied in the work of the Board of Statutory Consolidation in simplifying the practice in New York and may be of assistance to others who are interested in a similar work.

In New York one of the most troublesome tasks in connection with the revision of the procedure was the separation of the substantive and adjective provisions of the code of civil procedure of that state, which consisted, when the board began

its work on the statutes, of 3,441 sections. This separation was deemed of primary importance and the report recommended by the board relegated all of the substantive matter in the code to new or existing general laws.

The principles enunciated in this article are not all new, but it has been thought that a restatement of the principles of procedure after their practical application in working out a reformed procedure for New York might be of value in crystallizing sentiment on this most important subject.²

Illustrations by examples and explanatory notes have been omitted and the discussion of the principles has been restricted owing to the necessity of condensation.

Separation of Substantive and Adjective Matter

There should be a complete separation of substantive and adjective matter.

It is quite a common practice for legislatures to lay down a substantive provision and follow it up in the same act with a remedy for a violation thereof. In most codes of procedure substantive law is mingled with adjective law. No or-

1. The Board of Statutory Consolidation was created in 1904 and under a constitutional provision Justice Rodenbeck retired as chairman upon his elevation to the bench. The remaining members of the board are John G. Milburn and Charles A. Collin, of New York City, and Adenbert Moot, of Buffalo. The board has prepared and submitted to the legislature a complete revision of the code of civil procedure of New York. Substantive provisions were removed and placed in new or existing substantive statutes and a proposed short practice act and rules of the court were prepared. The revision is now pending before the Legislature.

2. Report of Am. Bar Assn. (1909), p. 588.

3. Report of Am. Bar Assn. (1910), p. 635; "Some Principles of Procedural Reform," Roscoe Pound, Ill. Law Review (1909), p. 288; "Cardinal Principles to Be Observed in Reforming Procedure," Roscoe Pound, 75 Central Law Journal (1912), p. 150.

derly classification can be made of a statute embracing both substantive and adjective law. These two classes of law are distinct in character, the one defining rights and the other prescribing remedies. One of the grossest violations of this rule is found in the code of civil procedure of New York. Any proposed practice will be seriously vitiated which does not make a discrimination between and a separation of substantive and adjective law. This applies to provisions relating to evidence, costs, fees, disbursements and interest, limitations of actions and miscellaneous remedial rights. Provisions regulating the practice in courts of justice of the peace, surrogate's courts and local city courts should be enacted as independent statutes and not as chapters of a practice act. Substantive statutes and provisions relating to the practice in special and local courts, if deemed necessary, may be bound, as in England, in the same volume with the practice and are just as convenient in that form as if made chapters of a mongrel code.¹

Complete Disposition

There should be afforded an opportunity for a complete disposition of the entire controversy between the parties.

This is a cardinal principle that is not always observed. Procedure sometimes places limits both on the joinder of causes of action and of parties. The better rule is to let all the parties come in or be brought in who have any interest in the controversy and let all causes of action or cross-claims be joined subject only to a separate trial of any issue if deemed necessary or expedient by the court. This is the English rule and is an advance on the practice of limiting the causes of action and parties that may be joined.

Transference of Causes

The transfer of a cause to another forum or place of trial should be permitted where jurisdiction exists.

1. For an exemplification of the practical application of this and other principles stated, see Report of Board of Statutory Consolidation presented to the legislature of New York, 1916.

A case should not be thrown out because brought in equity when it should have been brought at law or because the wrong place of trial has been designated, but, if jurisdiction exists, the case should be transferred to the proper forum or place of trial. The practice of throwing out cases for an erroneous forum or place of trial is sometimes permitted by fixed statutory rules prescribing definite places of trial and sometimes by the decisions of the courts, laying too much stress on the distinction between actions in equity and at law.

Single Trial

A single trial should be encouraged so far as practicable.

Rules should be adopted which will enable the parties and the courts to try out the issues of fact once for all. Liberal rules relating to preparations for trial and rules permitting the court to reserve questions of law and submit questions to the jury in the alternative will assist in this direction. Special verdicts should be resorted to whenever practicable to avoid a retrial.

Single Appeal

A single appeal should be encouraged by rules designed to obviate a second trial.

One of the most wasteful features of our present appeal system is to send a case back to be retried *in toto* when the reversal is as to some fact only which might be retried with a reservation as to the rest of the case. Another is to reverse cases upon technical errors. A third is the restriction, which does not exist in the English Practice, against taking evidence on appeal where it can constitutionally be done. These defects can be obviated by suitable provisions. They grow out of the contentious origin of our practice and should be eliminated. The appeal should be treated as a motion for a new trial which should not be granted except for an error affecting a substantial right.

Uniformity of Procedure

There should be uniformity in the rules of procedure so far as practicable.

There should be no separate court of equity and at law, but one court should be empowered to administer both forms of relief. The latter is true of New York and other jurisdictions. There should be no distinction in the form of an action in equity and at law. This is also true of New York and elsewhere. There should be but one form of action and no special proceedings except where the constitution requires it. There should be no demurrer, but questions of law and all other questions relating to pleadings should be by motion. The substantive statutes should not be cluttered up with special remedial provisions. There should be one form of procedure for the enforcement of all substantive rights, with such modifications to meet idiosyncracies of special cases as may be found necessary. Uniformity in other respects should be the rule. This principle will wipe out many useless duplications which lead to confusion and waste of judicial time.

Flexibility of Procedure

The procedure should be flexible, so as to permit of deviation when necessary to do justice.

No one would argue before a body of laymen that a mere rule of procedure should stand in the way of doing justice and yet a legislative practice may require the courts to subordinate justice to procedure. Legislative rules cannot be made flexible without making them discretionary, and then their value as legislative rules ceases, and in this form they often confer upon the courts powers which they already possess. If the courts can be trusted to determine substantive rights, they can be relied upon to make the rules by which those rights shall be determined. We can trust the courts quite as safely as we can the legislature, whose very acts are subject to review as to their constitutionality by the courts. Arbitrary action under a court rule system can be avoided

by permitting an appeal where a substantial right is affected.

Control of Procedure

The control of fundamental matters of procedure should be in the legislature, but the details of procedure should be regulated by rules of court.

The almost universal practice in this country is to regulate most of the details of practice through legislative enactments even to the extent of vesting in the courts powers and jurisdiction which they already possess. The change from this method of regulating procedure to one wherein the control of the legislature is limited to fundamental matters of a more or less substantive character, leaving the details of practice to be governed by rules of court, is the one along which modern progress in the improvement of procedure should be made.

The tendency has been to get away from formal and mechanical methods of trial. Fixed statutory rules are a survival of the old idea. It is only a difference in degree between a trial by any of the ancient mechanical methods and by fixed legislative rules, binding the courts, according to which the contest must proceed.

Some of the rules ordinarily prescribed by the legislature vest discretion in the courts which is wholly unnecessary and others provide merely for the orderly conduct and dispatch of business which the legislature would not think of imposing upon administrative bodies. Greater latitude in procedure is often accorded to bodies like workmen's compensation commissions and public service commissions than is given the courts.

There are proper constitutional functions for the legislature to discharge, but one of them is not the regulation of details of procedure in the courts. There is a sufficiently wide field for their activity without encroaching on judicial functions and the admonition may well be addressed to them: "Act well your part, there all the honor lies."

The Federal courts, if not the state

courts, will protect litigants in their reasonable rights to meet their opponent's case, to present their own case, and to a judgment within the issues and within the jurisdiction of the court.

The legislature should prescribe, so far as it can constitutionally, the organization of the courts, their jurisdiction, the powers of the judges, the powers and duties of administrative officers and the important parts of procedure partaking of a constitutional or substantive character and let the courts control the details of practice.

The regulation of procedure was an inherent power of the courts at common law and the regulation of the details of practice by the legislature is an exercise of an ultra legislative function.

Simplicity of Procedure

Procedure should be made as simple as practicable.

This principle applies to short pleadings and forms, elimination of "exceptions" on the trial, summary judgment, and to numerous expedients designed to remove the formalities which characterized ancient proceedings and to a greater or less extent contaminate many modern systems.

The pleadings should be short and should be treated as notices of the claims and cross-claims and not as something to be made the center of a subordinate controversy. Denials should be specific and not vague, general or evasive. A case once noticed for trial should be treated as noticed for all time. Under a general notice of motion the court should be permitted to grant any relief that the parties are prepared to meet on the argument. After a motion on the complaint and answer, a general motion should take in all the relief necessary for any party to prepare for trial. The calendar should be under the control of the court and not regulated by statute. An early trial should be permitted where necessary. This principle involves conciseness and condensation of expression. Lack of simplicity is one of the crying faults of the code of civil pro-

cedure of New York. David Dudley Field said that it was "everything that a code should not be." Legislative codes of procedure are apt to lack simplicity and to go into details because the very idea of such a code is to restrain the courts. If that is not the purpose, they are unnecessary where the courts have general jurisdiction with inherent power to regulate their own procedure. Simplicity cannot be expected from a legislative code because it proceeds upon the idea that the details of practice must be regulated so as to bind the courts to such a practice as the legislature thinks proper, irrespective of what the courts may think about the matter.

Expedition of Procedure

The time for taking the various steps in an action should be as short as practicable, in order to give only reasonable notice.

The notice of an action in local courts is shorter than it is in courts of general jurisdiction. The summons in local courts is usually returnable on a day certain in court, while in courts of larger jurisdiction the summons is a mere notice to plead. The former may very well be applied in courts of general jurisdiction where expedition is desired. The time usually provided in courts of record is too long in many cases. A distinction should be made between important litigated cases and commercial cases. Time is of the essence of a commercial case. A commercial case must be tried speedily or it never will be tried. A common fault is the attempt to make all cases fit the same mould. Delays and other causes are driving business from the courts.

Substantive Justice

The substantive rights of the parties should be the primary consideration.

This principle would seem axiomatic if it were not a fact that in some jurisdictions procedural rights exist which may obscure substantive rights. From the commencement of an action until its final determination on appeal every step should have regard to justice and not to proced-

ure. This purpose suggested the rule of disregarding mistakes, irregularities and errors at any stage which do not affect a substantial right. Every time the legislature ties the hands of the courts with a detail of practice it places a possible obstacle in the way of doing justice in a particular case. The legislative codes grew up at a time when procedure was given undue prominence. The idea was that there were certain fixed rules according to which justice must be arrived at and that the courts must have no control over these rules. That idea is gradually dying out and those who do not appreciate that we have advanced beyond that stage in this country are behind the times. The sole aim should be justice and everything should be subordinated to that end.

Practical Application

The practical application of the foregoing principles may be accomplished by passing a short practice act containing a provision for a convention to prepare the rules of court and supplemental statutes, all to go into effect at a future time, sufficiently advanced to permit the bench and bar to acquaint themselves with the new practice.

In New York the entire work was submitted to the legislature at one time. It comprises a short practice act, rules of court and statutes. The practice act contains a provision for a convention to revise the rules before the revision goes into effect. A simple program is to draft and present a short practice act embodying the proposed reforms and postpone the time of its taking effect until the balance of the work can be done. This will force the bench and bar to consider the revision seriously and give them an opportunity to familiarize themselves with its provisions and be prepared to act intelligently before the change goes into effect.

These rules should be prepared by members of the bench and bar and not by the legislature. The courts and not the legislature have the responsibility for the administration of justice and they should determine the procedure according to which their duties are discharged. Leg-

islative justice should not be permitted longer to supersede judicial justice. The courts might as well seek to legislate under their powers to declare statutes unconstitutional as for the legislature to seek to adjudicate under their constitutional powers to legislate. The normal, natural and inherent method is for the courts to regulate their own procedure. There is nothing in the experience of the past to justify a continuance of the experiment of legislative control of the details of procedure.

There is a nation-wide sentiment among the bench and bar to restore to the courts the constitutional powers to regulate their own procedure and to take from the legislature the power over the administration of justice which it assumes to exercise under the guise of legislation.

Nebraska in the Lead

In the matter of creating a responsible bar organization, with necessary powers and duties, the Nebraska State Bar Association is at this time taking the leadership. A committee to study the subject and draft an appropriate law made its first report with a draft at the meeting held in December, 1917. The committee was composed of the following: J. H. Broady, J. A. C. Kennedy, C. E. Abbott, Frederick Shepherd.

A very lively discussion followed the reading of the report. The interest in this subject was evinced by strenuous support and opposition. Finally the matter was recommitted for further study and will come up for action at the meeting to be held in the last week of December, 1918.

The draft act prepared by the Nebraska committee was the first ever attempted in this field by American lawyers. The model act published in this number resembles it in many important elements. Like the model draft it provides a board of governors to be elected by the members casting their ballots either by mail or in person at the annual meeting. The governors will select the other officers who will hold for shorter terms.

The act makes every practicing lawyer in the state a member of the society. Its principal purpose is to establish explicitly the powers of the organized bar with respect to administering discipline. For this purpose the governors are to hear and investigate charges and impose penalties, either of suspension, expulsion or disbarment. The accused member has a right of appeal to the Supreme Court and is forbidden to engage in practice pending the hearing on his appeal.

The board of governors is to consist of twenty-one members "together with the judges of the various District Courts of the state, who shall be *ex officio* members of the board with powers and duties equal with the elected members." The board is to meet quarterly.

It is expected that the form of the draft will be settled at the coming meeting and that a bill in accordance therewith will be introduced in the Nebraska legislature shortly thereafter.

Redeeming a Profession

Introducing a Practical and Logical Plan for Bar Organization Which Will Enable the Bar to Realize Its Highest Ideals

In Bulletin I of the AMERICAN JUDICATURE SOCIETY, which is an analysis of the causes for dissatisfaction with the administration of justice, on page twenty-one, these suggestions were offered:

A. It has been pointed out that the present organization of lawyers is purely social and voluntary, including in many instances only a small part of the total number of lawyers. It has no such organization or powers as would enable it to take charge of admissions to the bar or the matter of disbarment or the discipline of members of the bar and enforcement of an authoritative code of legal ethics.

B. It is suggested that what is needed is a legally incorporated society which shall include all lawyers by the simple process of fixing the fees to be paid and the requiring of every lawyer, as a condition to continuance in practice, to keep up his membership in the society; that the governing board of such society should be composed of representatives elected for a considerable term and that the governing board should have power conferred upon it to enforce the rules of the highest court of the state as to admissions to the bar; also to enforce any authoritative code of legal ethics and disbar members.

The proposal for an incorporated association of the bar of a state to include all practicing lawyers, and to exercise large powers with respect to admission to the bar and discipline of its members, met

with strong support from members of the Council of the American Judicature Society, as appears from quotations published in Bulletin III, page 35, *seq.* Since that time the drafting of a model act to create such a state bar association has been on the program of the Judicature Society and the draft is now offered to the profession and the public.

The act which follows provides for the incorporation of the typical state bar association with an organization which permits of majority rule. It gives to the incorporated bar the duty of examining candidates for admission and confers large disciplinary powers, subject to judicial review.

To Integrate the Bar

There is provided a board of governors to exercise executive powers, the members of which are to be elected by the votes of the entire membership, cast either by mail or personally at the annual meeting. Every member of the association is given a voice and a duty. The organization so created is a good example of representative government in its simplest form. It differs only slightly from the type of existing state bar association, but the differences are vital.

The aim of the act is stated most con-

cisely as one to *integrate* the bar of a state, to bring home to the individual lawyer his responsibility to the profession and to provide him with power to discharge his duty.

The act is based on the theory that the state association is the vital unit of organization and that existing state bar associations are insufficient for the purposes implied. They have gone a considerable distance, but in their present form represent an incomplete evolution.

There will probably be little opposition to the first postulate. There is a need for city and county bar associations, if only for the purpose of promoting friendly relations between members of the local bar. Some of these associations exist for the purpose of maintaining co-operative law libraries and serve this end excellently. But all the lawyers of each state have common rights and duties and mere local organization can never fill the need for a strong state organization.

It is possible to conceive of a state association consisting of federated local societies, but this scheme is unnecessarily involved. It would create a great deal of machinery difficult to keep in working order and would have the serious disadvantage of enforcing uniformity upon all its subordinate units. The local associations should be left free to experiment and to adapt themselves to their local needs, which vary greatly as between city and country.

As for the belief that the typical state bar association is insufficient to meet present and future needs, it is all summed up by saying that they lack integration. This lack may be illustrated by a brief survey of the situation.

We observe first that the state bar associations are weak in numbers. They embrace on the average but one-fourth of the entire bar. They fail to make a successful appeal to many excellent lawyers who stand ready to do their share for the advancement of their profession, but who are unwilling to waste their time on a piece of futile machinery.

Others feel that they cannot well afford the time and expense involved in attending meetings, often held at distant points and at inopportune times, and that membership without attendance is meaningless. To them the state bar association is something dim and remote, having real existence for only two or three days in every year. They cannot connect it with any recognized duty to the profession or to their conscious desire to advance its interests.

The association fails to appeal successfully to a large class who look upon it as mainly a social institution and who possess no marked social proclivities. Some such lawyers, nevertheless, are members, and very useful ones, and will be the first to give sympathetic consideration to proposals for making the bar association a living and working entity, though without trenching on its very useful field of social intercourse.

The numerical weakness of the associations is acutely realized when a crisis arises in the state's affairs or those of its courts.

Although practically all the business of the associations is done at its meetings, and there is little opportunity for participating except by attending meetings, less than one-fourth of the members attend each meeting. Such attendance as there is is irregular, so that most of the members come to the meetings as virtual strangers at intervals of two or three years.

There can be little continuity of purpose and accomplishment under these conditions. The carrying out of the work authorized by the association is ordinarily through committees and they operate at a great disadvantage. Never less than a year is allowed for a committee to perform its duties. It reports to a different assemblage from that which authorized its creation. Often the subjects reported are too technical or too involved to permit of thorough consideration by an unprepared audience under the limits of time necessarily imposed. Often an

aimless discussion follows a good report and the committee considers itself fortunate to withdraw the subject until another year has passed.

Control by a Clique

The officers have but little power because the associations themselves have but little power. Presidents and vice-presidents are elected annually. Some associations have provided longer terms for trustees or governors and this helps to ballast the ship. But in most of them the president is supposed to be the driving power and his principal duty is to prepare his annual address.

If it were not for the work of a faithful few the machine would stop running. They attend regularly and try to make the meetings safe, at least, and, if possible, fruitful, and they govern. It is no lack of sympathy which sets this down as clique government. *Under the existing system there is no opportunity for anything but clique government.* Without the assiduous attentions of the clique the organization would die.

The average member has but three assured points of contact with the association:

- (a) He pays his dues.
- (b) He receives a report of the annual meeting, usually a number of months after it is held.
- (c) He votes for officers, providing he attends the meetings. But the voting is no more than an idle gesture. He merely votes for the list recommended by the nominating committee, which is personally selected by the clique. His voting cannot express his views with respect to policies.

Is it any wonder that judiciary committees of legislatures, composed entirely of lawyers, snub state bar associations, or that many very capable and responsible lawyers sneer at them?

And yet, notwithstanding the lack of integration, the virtual impotence of these associations, they do represent the profession. They represent the profession not because they are well qualified to

do so, but because there is no other representation for it. They have acquired, by their mere existence and occupation of the field, responsibilities which are constantly growing.

What needs are disclosed by the foregoing criticism? The successors to the typical associations must do vastly more than honor their faithful members by election to office. They must give to every member a share in the work to keep him interested. This will create a cohesiveness now lacking. They must become vehicles of policy, registering the opinions of their members on a variety of germane topics, and must be competent to execute these policies. - The work must be kept going not only with continuity from year to year, but throughout every year, and the members must be kept informed frequently of the progress made. The aim must be to extend the membership to include all practicing lawyers. If any lawyer does not like the way the association which stands for his professional interests is managed let him become a member and do his kicking from within, where it may be constructive.

Effective management is to be sought by vesting the powers of the association, or many of them, in a governing board large enough to be fairly representative of all kinds of lawyers and all parts of the state. Membership on this board should be for not less than five years. This does not do away with the rather ornamental offices of president and vice-president, which offices are best filled by the choice of a clique. But the clique which chooses the president and vice-president should be one representative of the entire membership, the board of governors. There is no objection to continuing the practice of changing presidents every year, for the real governing power will be continuous in the governing board.

The necessary share of control for the individual member is obtained by permitting him to nominate and elect, without hindrance, the members of the board. This is readily accomplished by providing for an election by mail. The system

is already in use in similar bodies with entire success.

The annual report is too tardy and too infrequent to serve its real purpose of informing members of the trend of events. A monthly or quarterly journal is needed. Those who have seen the quarterly journals of the American Bar Association and the Massachusetts State Bar Association will appreciate the necessity for this sort of thing. The Illinois State Bar Association has also a quarterly bulletin which permits of presenting for consideration numerous matters which cannot well wait for the annual report. The publication of a timely journal soon makes the annual report subordinate, a mere compendium of useful data. In every state the development of the state's own common law calls for a lawyer's journal, with comment upon decisions, and the natural source of such a publication is the bar association. The journal will accomplish many things which the brief meetings, always competing with social interests, now cope with inadequately.

Of course, there is no intention to do away with the meetings or to underrate the value of personal association between the members and the judges. On the contrary, it would be well to have at least two meetings in each year, as is done in Ohio, and occasionally in other states. And the integrated bar association will find one of its opportunities for usefulness in encouraging occasional meetings of the lawyers of a circuit or a district, as is done in Illinois, where legislative programs are threshed out in seven different district subordinate organizations.

A comparison of the projected organization with the present typical state bar association reveals very little change after all in the general style and organization. But the changes are significant. They go to the heart of the present causes for inefficiency.

The Cardinal Powers

Coming now to the powers natural to a really representative organization, we find that admission to practice and discipline are the cardinal ones. They de-

fine the material that makes up the profession. The business of scrutinizing candidates for the bar and of exercising a continuing responsibility for their conduct is emphatically the business of the bar and is so explicitly recognized in other progressive nations. It is too big a job for an overworked and under-organized bench.

Admission to the bar is now in the hands of the bar in many of the states, but because of the lack of an integrated bar association the matter is entrusted to a few specially chosen bar examiners. There is nothing revolutionary in the proposal that this function shall be vested in an incorporated and truly representative state bar association. The powers would be exercised in the same way and presumably by the same men and the responsibility would dignify the association.

The courts are now dependent upon the bar for taking the initiative in practically all disciplinary matters. This is necessary because only a small part of the lawyer's work is done under the eye of the court. And the bar everywhere is reaching out to perform this work more capably because it realizes instinctively that this is the peculiar and essential business of the bar. The lawyer himself has a far greater interest in maintaining standards and protecting the profession from aspersion than has the judge or the layman.

So grievance committees have come into being, and while some few are doing their work heroically, in most states this work is done in a weak and uncertain manner. It is not so much a lack of will as of the machinery for accomplishing this onerous duty. The state associations need statutory power to discipline, but it is not to be conferred upon inefficient bodies which number only a moiety of the profession.

Discipline of the profession implies more than merely preferring charges for disbarment. In some states one of the great embarrassments lies in the fact that expulsion is the only penalty. But grievance committees know that not more than

one of ten complaints justifies disbarment. Lesser penalties are needed. The success of discipline resides in a continuing vigilance. Little sins must not be allowed to grow into big ones. There is much more in timely reproof than in the capital punishment of disbarment if the public and the profession are to be protected. It is prevention that is indicated, and for this the establishment of rules of ethics through "clinics" like those conducted in New York City have great potentiality.

Conferring express powers on a properly organized state association to investigate charges and impose penalties for unprofessional conduct, subject to judicial review, will solve the problem which is today pressing upon the bar associations of the country. It will also dignify the associations and afford the profession the only way of discharging the obligation to which it is held by the public.

"Prevention Better Than Cure"

It is desirable as a matter of principle to have the association include every lawyer in the state. The words bar and bar association should be synonymous, as they are in all other progressive nations. A lawyer not fit to associate with his fellow lawyers is confessedly not fit to associate with clients. The public holds the organized profession responsible for the conduct of all lawyers, whether members or not. It is possible for a non-inclusive association of the bar to punish non-members under statutory powers, and the act so provides, but punishment is not all of discipline. The *prevention* of unprofessional conduct is the only thing which will raise the bar to the place it aspires to hold, and that continuing vigilance and discipline which avails to prevent misconduct is hardly to be expected except in the case of members. The non-member is outside the stimulating atmosphere of professional ideals; he is in a position to do a great deal of mischief by jeering at the organized bar as a pharisaic and aristocratic institution.

The properly organized bar need not

fear to give membership and a voice to every lawyer entitled to practice. It should be the first practical step to exert prophylactic influence and to rid the profession of those who are not fit to remain members. A fear that the unfit will out-vote the fit is absurd. Let a square issue be presented and the preponderating majority of the profession will be found emphatically on the side of decency. There has been justifiable fear on the part of existing state bar associations lest their membership be contaminated because a clique-governed body is always in danger of slipping.

The inclusion of every lawyer may not be possible at the beginning, as this would invite opposition on the part of the unfit, who would scent danger and fight the passage of the act. It would also invite active opposition from many worthy lawyers who will be skeptical of the idea of thorough self-government by the bar and will have to be convinced by a demonstration. As suggested in a note to section three, discussing this matter, the inclusion of all lawyers may be deferred for a period of five years. During that time the incorporated association should have no trouble in proving to every lawyer that he cannot afford to stay out. If not fit then to come in he should not be permitted to call himself a lawyer.

To the objection that the act vests large and dangerous powers in the organized profession, it should be said that it vests no powers which are not now being exercised in a more or less halting and ineffectual manner. It provides a safe vehicle for these powers. And what are they in comparison to the powers conferred upon every lawyer when he is admitted? Assuredly very slight.

After all, an organization scheme is only a scaffolding within which the coming edifice of the bar as a learned, responsible and self-disciplined profession, will be erected. The range of activities of such an association will not stop with the matter of admissions and discipline, which are largely domestic policing; they will be constructive in ways now

hardly dreamed of. There will be many opportunities for developing increased usefulness to all its members and to the public. The state association can co-operate in many fields with the city and county associations. The development of "ethics clinics" in every state, as now in New York, is entirely possible. Through these clinics advice will be given on many embarrassing ethical questions. Another field, recently entered upon by the Illinois State Bar Association, is that of creating a pension fund for the benefit of unfortunate members. It was suggested at a meeting of the Conference of State and Local Bar Associations held at Saratoga in 1917 that there should be a fund from which loans could be made to needy members, thus acting on the theory that prevention of offenses is better than punishment. Such an integrated bar would naturally, and with the greatest resources, address itself to the task of advising courts and legislatures with respect to simplifying procedure. It would form just such a sustaining body as our courts need and this alone would be reason enough in many states for its existence.

The Bar's Growing Conscience

We are too far from the first fifty years of national life to compare the status of the bar, as represented by the average lawyer of that period, with its present condition. It was a period of great opportunity and great leaders. Of the last fifty years we know that the profession has lost ground actually and in comparison with the scientific and engineering professions. We know that in this period of eclipse it has become commercialized as has no other bar in the world.

But there is encouragement in the growing conscience and steady progress of recent decades. An ideal of an American bar is being born in the minds of lawyers East and West, North and South. We can still regain lost ground. Other professions have surpassed us in the quality of service rendered. But in scientific and material progress there is something approaching finality. The law becomes

every day more significant. The great era of the lawyer is just opening. In an autocracy the lawyer is only a part of petty officialdom, performing the functions allotted to him. But the approaching world-wide spread of democratic institutions exalts the legal profession above all others. Democracy shapes its ends through numberless experimental laws and the lawyer is of necessity a guiding and often a controlling factor.

To say that the lawyer is indispensable to the era of self-government is merely stating what is primary and axiomatic. He will do his work well or he will do it badly, and the difference will depend upon his ability and freedom to develop the best that is in him. If the creation of an integrated bar, ballasted with responsibilities and winged with actual power, will make for more capable and more conscientious individual lawyers, then it is of the utmost importance to state and society that the lawyer's present tendency to organize and assume duties shall be encouraged. There can be no conflict of interests here. The lawyer cannot improve his own status without rendering a higher quality of service. The interests of the public and of the lawyer are fundamentally identical.

Try this formula with any other necessary element in society, bankers, brokers, mechanics, engineers; their own interest and the public's interest are identical, that they should perform their allotted services most efficiently. And in the long run their emoluments will be proportional to the quality of service which they render.

But it is a more insistent principle in the case of the legal profession, because *lawyers monopolize essential powers and functions*. The powers which it is proposed in this act to vest in them are inconsequential, from the standpoint of potential evil, when compared with the powers daily exercised by the least competent of lawyers.

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(Note: The reports of the Law Societies of the Provinces of Ontario, Manitoba, Alberta, Saskatchewan and British Columbia, obtainable from their respective secretaries at provincial capitals, contain much valuable information concerning the actual operation of all-inclusive, incorporated bar associations. The American Medical Society's reports and pamphlets (Chicago) also explain very fully how the medical profession was integrated and elevated through organization.)

Bar Association Act

An Act to Create the State Bar Association of the State of

PART I

Creation—Name and Powers of the Corporation

SECTION 1. State Bar Association created a corporation.]

- 2 There is hereby constituted a body corporate and politic under
- 3 the name of "The State Bar Association of the State of
- 4," (hereinafter called the Association or Society).

SECTION 2. Powers of the corporation.] By that name the

- 2 corporation shall have perpetual succession and a seal (which
- 3 it may at pleasure change), and may sue and be sued, contract
- 4 and be contracted with, and may for the purpose of carrying
- 5 into effect and of promoting the objects of the corporation
- 6 acquire real and personal property by gift, devise, bequest,
- 7 purchase or otherwise, and may hold the same or sell, mortgage,
- 8 lease or otherwise dispose of the same.

SECTION 3. Only members on the active list to practice law.]

- 2 No person shall practice law in this State subsequent to the first
- 3 meeting of the Association unless he shall be a member of the
- 4 Association and not on any inactive list thereof.

This section assumes that the Association is to be from the beginning inclusive of the entire bar of the state. Its effect is to compel every practitioner to become a member. Whether or not every practitioner avails himself of the privileges accorded members with respect to their control of the Association and otherwise, they must at least contribute to its support the small amount of annual dues.

If the policy determined upon is not that of compulsory membership Section 3 may be omitted, in which case only those who choose to do so will become members. With the omission of Section 3 every lawyer in the state is made eligible and is assumed to be a member, and will be so treated by the commission on organization until he fails to pay dues or otherwise indicates a wish to reject the proffered membership.

As to the choice of policy a great deal can be said. The ultimate ideal is that of an all-inclusive association, one which is not merely an association of the bar, but is the Bar itself. The Association will exercise its maximum influence only when it has the active support of every lawyer. It should feel entitled to the support of every lawyer and every lawyer in the state should feel a responsibility for maintaining the Association and a pride in his membership.

Practical objections, however, will be raised against the immediate attainment of this ideal. These are of two principal sources: within and without the bar. Within the profession there will be certain worthy lawyers who are skeptical of the benefits of organization and who may resent being obliged to accept any alteration of their professional status. There will be other lawyers who will see in this plan a menace directed at activities likely to become the subject of disciplinary rules. This latter class is probably in no state very numerous, but wherever it exists it is likely to be found alert and resourceful. It is likely to possess or control legislative votes and be capable of conducting an effective though nefarious campaign against the passage of the act. Finally there is the element existing in all voluntary bar associations which is timorous of contact with the less respectable element among practitioners. They will fear to confer a share in the democratic control of the Bar to this less respectable element. The answer to their fears is, briefly, that the ultimate control must be presumed to rest with the majority of the Bar and to rise at least to the level representative of the ideals and principles of the majority. They should not be afraid of the power of an element in the profession which is numerically weak as long as honest representation is assured, as it is by the act. The mere coupling together in a single organization of the best and the worst will do more to cure the evils experienced at present than any disciplinary rules and machinery, for it makes those of the highest motives responsible for the conduct of all, gives them the machinery for developing their principles and ideals, and at the same time gives to the less worthy the highest possible motive for ethical conduct, for misconduct will entail the risk of losing every professional right and privilege.

The objections from outside the Bar are of the sort which have been evidenced all through our national history by jealousy

of the profession's prerogatives. It is this jealousy expressed variously in legislation and otherwise which has largely prevented the development of a strong, self-respecting and self-governed Bar. But this feeling has been disintegrating in most states through each succeeding decade. It can be reasoned with and converted. The act itself answers every argument which is honest, for it gives no new powers to the Bar. It simply recognizes obligations and furnishes a practical means for their fulfillment.

In case Section 3 is omitted the Association will comprise only those who give the idea their active assent. This number should be at the outset considerably larger than the present state bar association membership for many lawyers now refrain from membership because the voluntary association is necessarily controlled by a small clique, because participation in its control involves the effort of regular attendance upon meetings held often at a considerable distance and at inopportune times, and because most such voluntary associations exercise but small influence and accomplish very little for the profession in a practical way.

As to the lawyers who do not become members at the beginning there will always be opportunity to solicit their support and to make the organization one which will attract them. By Sections 30 and 31 the non-members are made subject to the ethical and disciplinary rules and machinery of the Association.

It has been suggested as a compromise of the question involved in Section 3 that all persons admitted to practice after the taking effect of the act be ipso facto members of the Association, with loss of their status as a penalty for permitting their membership to lapse, but that members of the Bar at the time of the taking effect of the act be given five years for a voluntary choice, and after that time be required to become members or discontinue practice.

PART II

Membership

SECTION 4. **First members of the Association.]** The first
2 members of the Association shall be all persons now admitted
3 to practice law in this State.

SECTION 5. **Classification of members.]** Within three months
2 after the taking effect of this act the first members of the Asso-
3 ciation shall be divided into two classes—active members and
4 inactive (or retired) members, by the commissioners hereinafter
5 provided.

SECTION 6. **Classes of members defined.]** Active members
2 shall be all those who are not classified as inactive, or retired,
3 members. Inactive, or retired, members shall be those who
4 have retired from practice as retirement is hereinafter defined.
5 [Sec. 10.]

SECTION 7. **Commissioners to have authority to send out questionnaire.]** For the purpose of ascertaining how those designated as the first members of the Association shall be classified the commissioners hereinafter provided are authorized to send to each, or to so many as they may deem necessary, a questionnaire designed to determine in which of the designated classes each member may properly be placed.

SECTION 8. **Who entitled to be admitted to membership.]** After the organization of the Association as herein provided all persons who are admitted to practice in accordance with the provisions of this act shall become by that fact members of the Association.

SECTION 9. **Inactive members.]** Active members, who shall after the taking effect of this act, retire from practice, shall be enrolled on the inactive list. Members upon the inactive list shall not be entitled to vote for officers. They may, on application and payment of all dues required, be placed upon the active list. While remaining on the inactive list they shall have such other privileges, not inconsistent with this act as the Board of Governors may provide.

Some arrangement is necessary to insure control of the Association by members who are genuinely lawyers; it is also necessary to recognize the fact that the profession has naturally a considerable fringe of quasi members who possess the prerogatives of the lawyer but are not closely attached to their profession. There should be no effort to interfere with perfect freedom on the part of one who finds himself becoming more and more absorbed in other activities than the legal profession. By the creation of the inactive list these members are not wholly lost to the profession. At their own option they may retain the full privileges of membership by continuing to pay the larger dues required from active members. Or, if they choose, they may reduce their dues without losing any of their rights to practice. The succeeding section takes care of the status of the member elected to the bench or to any other public office which temporarily limits his ability to remain in the practice of his profession. Such members remain on the active list unless they prefer to accept the limited liability membership.

SECTION 10. **Retirement from practice defined.]** Until the Board of Governors, with the approval of the Supreme Court, shall otherwise by rule provide, absence from the practice of law, or the devotion of a major portion of a member's activities to another profession or a business for two years, shall be deemed a retirement from practice; but this shall not apply to members filling public office during the term of such office.

SECTION 11. **Fact of retirement, how determined.]** The fact of retirement of a member may be determined by the Board of

3 Governors upon a hearing, or the Board may delegate to a com-
4 mittee the determination of the fact on behalf of the Board, or
5 require it to take evidence and report the same to the Board
6 with its recommendation.

PART III

Officers

SECTION 12. **Officers named.]** The officers of the Association
2 shall be a President, a Vice-President, fifteen members of the
3 Board of Governors, a Secretary and a Treasurer; provided, that
4 not more than Governors shall be elected from any judicial
5 circuit.

SECTION 13. **Selection of President and Vice-President.]** The
2 President and Vice-President shall be elected by the Board of
3 Governors at the time of the first meeting of the Association, as
4 herein provided, and thereafter at the time of the annual meet-
5 ing of the Association, from among the members of the Associa-
6 tion entitled to vote for Governors, including members of the
7 Board of Governors. No President or Vice-President shall be
8 eligible to succeed himself. The new-elected President and
9 Vice-President shall assume the duties of their respective
10 offices at the conclusion of the annual meeting at which they
11 are elected.

There is no objection to the President and Vice-President
being elected by the members of the Society at the first meeting
and thereafter at the annual meetings. In view of the longer
terms of office of the Governors, and their powers, the President
and Vice-President would not be so much the leaders in the busi-
ness activities of the Society as the holders of honorary positions—
the figure-heads for social occasions, not required to make a rec-
ord during their single term of office. The proper men for such
positions as the President and Vice-President are designed to fill
are more likely to be obtained by appointment by the Governors
themselves than if a contest for votes had to be started among
several thousand lawyers.

SECTION 14. **The Board of Governors.]** The Board of Gov-
2 ernors shall consist of fifteen Governors and the President and
3 Vice-President.

SECTION 15. **Terms of office of Governors.]** Of the first
2 Board of Governors three shall hold office until the conclusion
3 of the first annual meeting of the Society; three for two years
4 from that date; three for three years from that date; three for
5 four years from that date, and three for five years from that date.
6 Thereafter vacancies in the Board shall be filled for the term of
7 five years.

SECTION 16. **Five members of first Board of Governors**
2 **appointed.]** Five members of the first Board of Governors hold-

3 ing office respectively until the conclusion of the first annual
 4 meeting, and for the terms of two, three, four and five years
 5 after that date, shall be appointed by the Governor of the State
 6 from among those qualified for active membership in the Asso-
 7 ciation who shall be serving or who shall have served as Presi-
 8 dent or a Vice-President of theState Bar Association

SECTION 17. **Commissioners to organize the Society.]** The
 2 five members of the Board of Governors so appointed shall con-
 3 stitute a commission to place this act in operation and to organ-
 4 ize the Association and adopt such rules and regulations for the
 5 time being as may be deemed necessary to complete the organi-
 6 zation of the Association, hold the first meeting, and generally
 7 give effect to this act.

A commission of some sort to organize the Association is obviously needed and it seems entirely appropriate that the members of the commission should be men of the sort who have been previously honored by election to the offices of president and vice-president of the former state bar association. The governor of the state is a disinterested authority well qualified to make a selection from the rather narrow field of choice. The commissioners not only organize the Association but have a continuing responsibility as member of the Board of Governors.

SECTION 18. **Ten places on the first Board of Governors to
 2 be filled by election.]** The ten remaining places on the Board
 3 shall be filled by an election to be held at the first meeting of the
 4 Association at which only those classified as active members
 5 shall be entitled to vote. Nominations shall be by petition, to
 6 which at least twenty signatures of those entitled to vote shall
 7 appear. The election shall be by ballot. Under the direction
 8 of the Commissioners the ballot shall be mailed to those entitled
 9 to vote at least ten days prior to the date of election, and the
 10 ballot may be returned by the voter through the mail. In other
 11 respects the mode of conducting the election shall be such as
 12 the commissioners shall prescribe.

If any need is felt for detailed provisions concerning the ballot and its counting, these provisions should be in the form of rules adopted by the Board of Governors and not in the act itself.

It has been suggested that the Governors be limited to not more than two successive terms of office as Governors. That can be effected by a proviso, as follows: "Provided that no member of the Board of Governors shall hold office as such for more than two successive terms of five years each."

SECTION 19. **Election of members of the Board of Governors.]**
 2 After the selection of the first Board of Governors as herein-
 3 before provided, all five-year terms of office as members of the
 4 Board of Governors shall be filled by election at the annual
 5 meeting.

SECTION 20. Mode of conducting elections for Governors.]
2 Nominations for Governors shall be by petition. The election
3 shall be by ballot. The ballots shall be mailed to those entitled
4 to vote at least thirty days prior to the date of canvassing the
5 ballots and shall be returned by mail. In other respects the
6 election shall be as the Board of Governors may by standing
7 rule direct.

SECTION 21. Filling vacancies for unexpired terms.] Vacan-
2 cies in the Board of Governors occurring before the expiration
3 of the regular term of office of a member of the Board of Gov-
4 ernors shall be filled by the appointment of the Board until the
5 next regular election of members of the Board of Governors.
6 At that time the vacancy for a regular or an unexpired term as
7 the case may be shall be filled by election in the mode prescribed
8 for the election of members of the Board of Governors.

SECTION 22. Duties of officers.] It shall be the duty of the
2 President to preside at all meetings of the Association and of
3 the Board of Governors, and of the Vice-President to preside in
4 his place in his absence. Other duties of the President, Vice-
5 President, and the duties of the Secretary and Treasurer shall
6 be such as the Board of Governors may prescribe.

SECTION 23. Selection of Secretary and Treasurer.] The
2 Secretary and the Treasurer shall be selected annually by the
3 Board of Governors from among the members of the Board of
4 Governors or members not serving on the Board as the Board
5 may determine.

**SECTION 24. Officers to continue in office until successors
2 qualify.]** The officers of the Association shall continue in office
3 until their successors are selected and qualify.

PART IV

Powers of the Board of Governors

SECTION 25. Powers and duties of Board of Governors.] The
2 Association shall be governed by the Board of Governors which
3 shall have the powers and duties hereinbefore and hereinafter
4 conferred and in addition thereto the following:

SECTION 26.(a) Board charged with executive functions.]
2 The Board shall be charged with the executive functions of the
3 Association and the enforcement of the provisions of this act.

**SECTION 27.(b) Power to appoint additional officers and em-
2 ployes.]** The Board shall have power to create such committees,
3 and to appoint such officers and employes as may be necessary
4 for the management and conduct of the business of the Asso-
5 ciation.

**SECTION 28.(c) Power to promote social intercourse and im-
2 provements in the administration of justice.]** The Board shall

3 have power to take such action as may promote the social inter-
 4 course of the members and aid in the improvement of the admin-
 5 istration of justice in the State.

SECTION 29.(d) **Power to determine qualifications for ad-**
 2 **mission to practice.]** With the approval of the Supreme Court
 3 and subject to the provisions of this act, the Board shall have
 4 power to determine the qualifications of admission to practice
 5 in the State, and to constitute and appoint a special committee
 6 to examine candidates as to their qualifications and to recom-
 7 mend such as fulfill the same to the Supreme Court for admis-
 8 sion to practice under this act; provided, however, that until this
 9 power is exercised the requirements for admission to practice
 10 under this act shall be the same as those now prescribed by the
 11 Supreme Court for admission to practice in this state and shall
 12 be enforced as the same now are enforced through the State
 13 Board of Law Examiners.

SECTION 30.(e) **Power to formulate rules of professional**
 2 **conduct.]** With the approval of the Supreme Court, the Board
 3 shall have power to formulate and enforce rules of professional
 4 conduct for all members of the Bar in the State.

SECTION 31.(f) **Power to discipline and disbar.]** The Board
 2 of Governors shall have power for good cause shown, and after
 3 a hearing, to disbar members of the Bar in this State and to
 4 discipline them by reproof, public or private, and by suspension
 5 from practice; and the Board shall have power to appoint one
 6 or more committees to take evidence and make a determination
 7 on behalf of the Board, or to take evidence on behalf of the Board
 8 and forward the same to the Board with a recommendation for
 9 action by the Board.

There are at least four methods of conducting disbarment and disciplinary proceedings that must be considered.

First: There is the making of a complaint to the Grievance Committee of the Bar Association; its investigation by that Committee with a recommendation by it that disbarment or disciplinary proceedings be taken; the resolution by the Board of Governors that such steps be instituted; the application to the Supreme Court for leave to file a disbarment petition, upon which the Court passes upon the sufficiency of the allegations to make a case for disbarment; the reference of the petition to a master or referee to take the testimony and perhaps report his conclusion; the return of the master's report and the final determination by the Supreme Court whether on the evidence disbarment or disciplinary measures should be taken or not.

This is a very cumbersome process. Any large number of disbarment cases would gravely interfere with the regular work of the Court and would be resented by the Judges.

Second: There is the possible plan of permitting an affidavit

to be presented to any Judge at the instance of the Board of Governors or a person interested, which affidavit, if sufficient to disclose a *prima facie* case for discipline or disbarment, requires the Judge to issue a summons to the respondent to show cause. Upon the appearance of the respondent, the evidence is taken on both sides and the Judge renders a decision from which an appeal may be taken to the Supreme Court, or the Judge sends the evidence to the Supreme Court without a decision.

Such is the method adopted in the act creating the Law Society of Alberta.

This process lands the case in the Supreme Court ultimately but does not bother the Court with passing on the propriety of the complaint and the making of a reference to take testimony.

Third: Then there is the plan by which evidence is presented to the Board of Governors and they make their decision, from which there is an appeal to the Supreme Court.

Such a procedure is adapted to a situation where there are few complaints and few calls for disciplinary measures. Such a plan would break down if there were any considerable effort made to clean up among the lawyers in a large metropolitan district. The Board of Governors could not sit continuously and indefinitely through long hearings involving the taking of evidence, in order to disbar and administer discipline. Nor would such a method save the Supreme Court from an overwhelming mass of Bar Association cases.

What is wanted is a method which is summary, which may be carried on conveniently in a large number of cases simultaneously if necessary, and which will not overburden the Supreme Court or the Board of Governors.

The *Fourth* suggestion, therefore, is this: Let the Board of Governors have power to hear all complaints and make a decision, but let the Board also have power to appoint sub-committees, and as many as may be necessary, to take evidence and either report the same to the Board with recommendations or to make a decision on behalf of the Board. A review of decisions should be permitted by the Supreme Court only in case of disbarment or suspension from practice and then only upon leave granted by the Supreme Court in accordance with such rules or regulations as the Supreme Court may prescribe.

SECTION 32.(g) **Power to make rules.]** The Board shall have
2 power to formulate and declare such rules and regulations not
3 in conflict with the laws of this State or the provisions of this
4 act, as may be necessary or expedient for the carrying out of
5 this act, and shall by rule (subject always to the provisions of
6 this act) fix the time and place of the annual meeting of the
7 Association, the manner of calling special meetings thereof, and

8 determine what number shall constitute a quorum of the Asso-
9 ciation or of the Board of Governors.

SECTION 32a. (h) **Power to make appropriations of money.]**
2 The Board shall have power to make appropriations from the
3 funds of the Association; provided, no officer of the Association
4 shall receive any salary or other compensation for his services
5 except that he may receive, upon the appropriate action of the
6 Board, his actual and necessary traveling expenses for attending
7 meetings of the Board of Governors.

The provision that no officers shall receive salaries implies that the clerical work connected with the offices of Secretary and Treasurer will be performed by a paid employe. This appears a better way than to make an officer of the person who devotes all of his time to these office duties. The work will be done by a person specially qualified who will be responsible to the officers of the Association.

SECTION 33. **Rules to be binding.]** The rules and regulations
2 adopted by the Board shall be binding upon all members of the
3 Association and the willful breach of any of such rules shall be
4 cause for complaint against any members for conduct unbecom-
5 ing a member.

PART V

Districts and District Committees

SECTION 34. **Districts to be established.]** The Board shall
2 have power, and it shall be its duty, to divide the state into
3 districts consisting of cities, counties or judicial districts, or
4 otherwise bounded, as the Board may direct.

The plan for districts and district committees is worked out mainly with a view to the practical enforcement of disciplinary rules. For reasons stated in the note to Section 31 it is undesirable to centralize all the work involved in this field. The Board of Governors should not be expected to devote the time required for handling all the complaints arising throughout the state. At the same time it would be a great mistake to select too small a territorial unit for this function. The average county is too small. Members acting for the Association should not be too closely associated with persons subject to investigation for alleged misconduct. Probably in most instances the judicial circuit will meet the needs best because it will possess the merit of local understanding and yet avoid the embarrassment of too intimate contact. The Board of Governors is given great latitude in adapting these territorial districts to practical needs.

It is quite possible that this flexible system of local administration may also develop considerable value with respect to meetings for social intercourse and for the consideration of topics of interest to the profession.

SECTION 35. **District Committees.]** From among the active
2 members of the Association maintaining their principal office
3 for the practice of law in each district, the Board shall appoint
4 three who shall constitute the district committee for each dis-
5 trict; provided, that the members of the Board of Governors,
6 unless they decline so to act, shall be *ex-officio* members respec-
7 tively of the district committee of the district where they main-
8 tain their principal office for the practice of law, and shall fill
9 one or more, as the case may be, of the three places on the dis-
10 trict committee. ;

SECTION 36. **Term of office of members of the district com-
2 mittees.]** The members of district committees (except *ex-officio*
3 members of the Board of Governors) shall hold at the pleasure
4 of the Board of Governors, but not to exceed three years; pro-
5 vided members may be reappointed upon the expiration of any
6 term.

SECTION 37. **District Committees to receive complaints re-
2 garding the conduct of members of the Bar.]** It shall be the
3 duty and each district committee shall have power to receive
4 and investigate complaints as to the conduct of members prac-
5 ticing in the district and to forward their report to the Board
6 of Governors for action.

SECTION 38. **District Committees to report to Board of Gov-
2 ernors.]** Each district committee shall report at least once a
3 year to the Board of Governors, as the Board may direct, re-
4 garding conditions of practice and regarding the personnel of
5 membership of the Society having a principal office for the prac-
6 tice of law in the District.

SECTION 39. **Other duties of the district committees.]** The
2 district committees shall perform such other duties in further-
3 ance of the execution of the provisions of this act as the Board
4 may direct.

PART VI

Procedure In Handling Complaints Against Members

SECTION 40. **Power to summon witnesses and require pro-
2 duction of documents.]** At any hearing upon any complaint
3 the Board, or the committee before whom such hearing shall
4 be had, shall have power to summon and examine witnesses
5 under oath, compel the attendance of witnesses, and the pro-
6 duction of books, papers, documents and other writings neces-
7 sary or material to the inquiry, and a summons under the hand
8 of the Secretary of the Society for the attendance of witnesses
9 for the production of books, papers, documents and other writ-
10 ings necessary or material to the inquiry shall have the force
11 of a subpoena issued by a court of competent jurisdiction, and
12 any witness or other persons who shall refuse or neglect to

13 appear in obedience thereto, or who shall refuse to be sworn
14 to testify or produce the books, papers, etc., demanded, shall
15 be liable to attachment upon application to any Judge of the
16 court for the district, as in cases of contempt.

SECTION 41. **Scope of hearing.]** Any person complained
2 against, as herein provided, shall be given reasonable notice
3 and have a reasonable opportunity and the right to defend
4 against the charge by the introduction of evidence, the right
5 to be represented by counsel, to examine witnesses in his pres-
6 ence, and to cross-examine witnesses called against him. He
7 shall also have the right to require the Secretary to summon
8 witnesses to appear and testify or produce books, papers, etc.,
9 as above provided.

SECTION 42. **Record of proceedings to be preserved.]** A com-
2 plete record of the proceedings and the evidence taken at any
3 hearing upon any complaint shall be made and preserved by
4 the Board or by the committee taking the evidence upon such
5 hearing.

SECTION 43. **Board to make rules of procedure in hearing**
2 **complaints.]** The Board of Governors may, subject to the pro-
3 visions of this act, by rule provide the mode of procedure in all
4 cases of complaints against members for professional miscon-
5 duct or conduct unbecoming a member.

SECTION 44. **Review by Supreme Court.]** A review by the
2 Supreme Court of the action of the Board of Governors, or of
3 any committee authorized by it to make a determination on its
4 behalf, pursuant to the provisions of this act, may be had by
5 the person complained against, and the procedure upon such
6 review shall be such as the Supreme Court may prescribe.

PART VII

Meetings

SECTION 45. **First meeting and annual meetings.]** The first
2 meeting of the Society shall be held within one hundred and
3 twenty (120) days after the taking effect of this act. There-
4 after there shall be an annual meeting at such time as shall be
5 fixed by a rule of the Board of Governors, and the first annual
6 meeting shall be not less than six (6) months nor more than
7 eighteen (18) months after the first meeting. The place of
8 each annual meeting shall be determined by the Board of Gov-
9 ernors at least three months prior to the time of such meeting.

SECTION 46. **Business of the annual meeting.]** At the annual
2 meeting the Association shall elect members of the Board of
3 Governors, as herein provided, receive reports of the proceed-
4 ings by the Board of Governors since the last annual meeting,
5 the reports of other officers, the recommendations of the Board
6 of Governors for action, and shall receive and act upon the

7 reports of committees, and consider and act upon such matters
8 of interest pertaining to the efficiency and development of the
9 administration of justice and the legal profession, as may be
10 brought before it.

SECTION 47. **Special meetings.]** Special meetings of the As-
2 sociation shall be held at such times as may be provided by the
3 Board of Governors or as may be called by the President and
4 Secretary pursuant to such Standing Rules as the Board of
5 Governors may provide.

PART VIII

Dues

SECTION 48. **Dues payable upon organization of the Associa-**
2 **tion.]** At once upon the publication of the classified list of
3 members, as herein provided, notice thereof shall be given to
4 the members of the Association and their dues shall thereupon
5 become payable as follows: \$3.00 for all active members. Upon
6 the payment of said dues the members shall receive a certificate
7 issued under the direction of the commissioners, which shall
8 evidence the membership of the holder until three months after
9 the date for the first meeting of the Association; provided, how-
10 ever that no member shall vote for Governors at the first meet-
11 ing of the Association until dues shall have been paid.

SECTION 49. **Annual dues.]** Thereafter there shall become
2 payable from each member of the Association, twenty days
3 before the day fixed for the commencement of the first meeting
4 of the Association, and twenty days before each annual meeting
5 thereafter, dues as follows: \$5.00 for all active members, pro-
6 vided that the Board of Governors shall have power to increase
7 the amounts to sums not exceeding \$10.00.

SECTION 50. **Certificate of payment of dues.]** At once on the
2 payment of dues each member shall receive a certificate issued
3 under the direction of the Board of Governors which shall evi-
4 dence the membership of the holder until three months after
5 the next annual meeting of the Society; provided, however, that
6 no ballot shall be received from any member whose dues then
7 payable shall not have been paid.

SECTION 51. **Dues from inactive members.]** All persons on
2 any inactive list of the Society shall pay \$2.00 annually, which
3 shall become due and payable twenty days before the day of
4 the commencement of the first meeting of the Society and
5 twenty days before the day of the commencement of each an-
6 nual meeting thereafter.

SECTION 52. **Effect of default in payment of dues.]** Any mem-
2 ber, active or inactive, in default of a payment of dues for the
3 period of three months and who is still in other respects quali-
4 fied to be a member of the Association, shall be suspended from

5 membership in the Association, but may be reinstated upon the
6 payment of dues, together with all dues which would have
7 accrued during his suspension, if he had continued to be a mem-
8 ber in good standing.

PART IX

Penalties

SECTION 53. Penalties for practicing law without a license.]

2 If any person shall, without having become duly admitted and
3 licensed to practice, as by this act provided, or after any license
4 to practice shall have expired, as by this act provided, practice
5 or assume to act or to hold himself out to the public in any
6 way as a person qualified to practice or carry on the calling
7 of lawyer, or shall advertise or hold himself out with the object
8 of obtaining practice as a lawyer, he shall be guilty of an
9 offense under this act and on conviction thereof be fined not to
10 exceed \$500 or imprisoned for a period of not to exceed six
11 months, or both.

SECTION 54. Repeal of specific acts.]

To Get Judicial Reform Started

In a few weeks over forty legislatures will begin their biennial grind. In some states there will be a wish to begin a study of judicial reform. To get the work done in a thorough manner, the following draft for a bill is recommended:

An Act to provide for a commission to inquire into the subject of the administration of justice and the expediency of revising the Constitution and Laws relating thereto, and making an appropriation therefor.

Section 1. Be it enacted by the People of the State of....., represented in the General Assembly: That withindays after this Act takes effect there shall be appointed by the Governor a special commission of seven persons, whose duty it shall be to inquire into the subject of the administration of justice in this State, the operation of the Constitution and Laws relating thereto and the expediency of revising and amending such Constitution and Laws so as to promote the efficient administration of justice and to report as hereinafter provided. One of the Commissioners shall be designated by the Governor to act as President of the Commission.

Section 2. The members of the Commission shall not receive a salary, but each shall be entitled to his actual and necessary expenses incurred in the performance of his

duties under the provisions of this Act, to be paid by the State Treasurer on the audit and warrant of the State Auditor, certified to by the Governor. The said Commission shall meet for organization as soon as may be at a time and place to be fixed by the Governor, at which time and place they shall appoint a secretary of the said Commission. In case of a vacancy in said Commission occurring by death, removal, resignation or otherwise, the same may be filled by appointment by the Governor of the State.

Section 3. Said Commission is hereby authorized and empowered to employ a secretary, counsel, experts, stenographers, clerks and such other employees as may be necessary for the purpose of their investigation and report.

Section 4. The duties of said Commission shall be as follows:

1. They shall investigate the operation of the Constitution and Laws which relate:
 - a. To the organization of and methods of handling judicial business in
 - (1) The system of courts for the State at large; and
 - (2) The system of courts in any metropolitan district or districts of the State.
 - b. The methods of selecting, disciplining and retiring judges.
 - c. The rules of practice and procedure.
 - d. The administration of the criminal law.

- e. Trial by jury and the methods of selecting juries.
- f. The salaries of judges and the salaries or compensation of other judicial and administrative officers and employees attached to the courts.
- g. The selection, discipline and retirement of officers and employees of the courts, the clerks of court and their employees.
- h. The organization and duties of and methods of doing business by such officers, clerks and employees.
- i. Methods of selecting, disciplining and retiring members of the bar, their organization and conduct.

Section 5. Under each of the heads contained in the foregoing section, or others as detailed and comprehensive, the Commission herein provided for shall

- 1. Set forth the causes for dissatisfaction with the administration of justice; and
- 2. Make recommendations which to them shall seem proper for the elimination of such causes for dissatisfaction; and
- 3. Prepare the draft of such constitutional amendment, or amendments, or revision, and also such legislation consistent with the present Constitution or with any constitutional amendment, amendments or revision which they may deem necessary and expedient, as will, in their judgment, most effectively tend to remove any such causes for dissatisfaction.

Section 6. The Commission herein provided for shall embody the result of their investigation in a report which shall be prepared in proper form for publication, with a full index, and shall be transmitted to the Governor on or before the.....day of, A. D.....

The Commission shall also draft and file with the Governor any amendment, amendments or revision, of the Constitution and any Bill or Bills, embodying its recommendations, and he shall transmit the same to the General Assembly for their action thereon.

Section 7. The sum of.....dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated, to be paid in such manner, and in such sums, and at such times, as the Governor may certify to the Auditor, who shall draw warrants on the Treasurer for the same.

This draft was prepared by the American Judicature Society, To Promote the Efficient Administration of Justice. The

Society tenders its services in securing improvements in courts and judicial procedure.

Commercial Arbitration and the Law

Under the above title Mr. Julius Henry Cohen of the New York City Bar has made a notable contribution to the cause of arbitration. Mr. Cohen has long been identified with this subject as one of the leading commercial lawyers of the metropolis. His curiosity as to the derivation of the rule that agreements to arbitrate are revocable because of public policy (in that they "oust the court of its jurisdiction") led him to an exhaustive study of common law sources. Coke has been quoted in the cases in support of this view, but Mr. Cohen delved into what was becoming a remote past even in Coke's day, and after the most laborious research found ample authority for his belief that the common law was not jealous of arbitrations, but that, on the contrary, the binding character of such agreements was well established, and on the sanest of reasons.

The pursuit of this information constitutes one of the romances of legal research and its presentation is ably made. The book is replete with evidence that the absurd jealousy of domestic tribunals has outlived its times and should be abandoned as a wholly pernicious anachronism.

The book follows the meandering route of decisions in an entertaining as well as convincing manner. It is supplemented by an appendix containing much matter of interest to those who are promoting voluntary modes of adjudication.

Commercial Arbitration and the Law: Julius Henry Cohen. Appleton & Co., New York, 1918. Pp. 329.

The American Judicature Society exists because of the conviction of its members that earnest and intensive effort will avail to make the administration of justice in American courts more effective and more economical. Its work is educational.

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-

I do know that the United States, in its judicial procedure, is many decades behind every civilized government in the world; and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access of justice, is the greater part of justice itself.

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American Judicature Society

Editorial

In this number we present two schemes for judicial organization. One has been submitted to the Texas legislature and the other to the Oregon legislature. There are strong reasons for believing that the Texas draft will be approved by the legislature and submitted to the voters. It has won the approval of the Texas State Bar Association. Whether it becomes a part of the constitution, or fall by the way, it possesses intrinsic interest sufficient to justify publication. It represents the first submission of a concrete plan extending from the petty lay magistrate to the supreme court justice. It embodies a considerable measure of that administrative power and responsibility which are implied in the term "business management for courts."

All students of judicial organization will be repaid for a study of this draft. We regret that we cannot afford space for fifty pages or more of the interesting discussion given the subject by members of the Texas State Bar Association, because their remarks reveal a genuine crisis in the state's history. We will indulge in just one brief quotation from the remarks of Samuel Dabney, Esq., a leading exponent of the reorganization plan:

"Whether we succeed or not, it would be cowardice not to try for reform. It is not a willful desire to do harm which is the main trouble, but pessimism and the cry that nothing can be done. Our judges are ill-treated, forced into politics, and the best among them cannot render the highest service. They are constantly confronted with an opposition between holding their offices and doing their duties, involving the very bread and meat for their families. That by far the greater number have stood up, under these circumstances, is to their credit.

"In the plan submitted it is a major purpose to take care of the present judges, and to put them in a place where they can better perform their duties; but it is hopeless to expect the administration of justice, even from men of the highest ability and character, unless they be given an opportunity for the efficient performance of their duties.

"I consider also that the bar is placed in an increasingly difficult situation. It is essential to the administration of justice that lawyers should receive decent compensation. As it now is they must do their work over and over, time and time again, in passing up and down through the hierarchy of courts. Continuances, adjournments, delays, reversals and turning the wheels, occupy almost indefinitely their time and consume their work, until, if they charged fees commensurate with their best labors, they would often charge more than the values in litigation. So it goes; the ever-going cost bills, stenographers' bills (which are often larger than the lawyer's fee), printers' bills, appeals, writs of error, and delays, until hardly the toenails of the clients are left unground, and the lawyer is filled with disgust of his profession. Lawyers refuse cases because it is impossible to charge fair compensation, or, out of pity, give their services, or advise compromises, and the clients take what they can get. I am now counsel in a litigation which, in its different branches, has lasted over twenty-five years, with trial on trial, appeal on appeal, reversals of position and confusions growing up through the complications of the wheels, and the end is not yet. No lawyer who started this litigation is now in it—I presume that they are now dead—and the litigants have largely died; and it is reasonable to suppose that this litigation has helped to press the lives out of them. Such things are monstrous, and destructive of any civilization.

"The ideal for which we strive is a flexible, business-like system, wherein there shall be one trial and one review. The Texas system reminds one of some old, rusty machine, which, by having part after part added to it, has grown to enormous size. Wheel has been put on wheel, to adjust a wheel there and control a motion here; a crank to add more power to one part; a brake to hold down another part, with the

view apparently, that, instead of grinding once for all, it shall grind and re-grind, and thus produce a fine meal at last. But its force is taken up, in great part, in turning its own machinery, the wheels often not functioning on each other. Hence it is that, instead of having one compact machine, we have a great number, oppressing the people. It does not help to bring up rules of practice to grease a part here or there. The old machine remains, and the unneeded parts must still be turned. . . .

"An instant reform cannot be accomplished, but it is thought that by this plan we can attain a machine which will function itself steadily toward a better personnel, bring about a decrease of blackmailing suits, and at the same time an increase in litigation of rights, which are now so often compromised, when they should not be compromised."

This is the racy language of debate, spoken by a man of spirit and a high sense of order. What Mr. Dabney has said applies to more than one state and in part at least to the best of them.

Dr. Roscoe Pound, who was a guest of the Association, when called upon for a statement, said in part:

"The thing that comes to my mind first, and seems to me to be the most important, is that, on very carefully re-reading Mr. Dabney's proposition last night, and listening to what has been said this morning, I feel more and more that that is a remarkable and admirable production. I have been studying projects of this sort for many years. In fact, I first urged this matter as far back as 1906 before the American Bar Association,* and I think I have read all the projects that have been advocated, and I do not know of any one that approaches this in its conservative radicalism, if I may put it so, its soundness, its sense for necessary compromises that do not affect the principles, and its thoroughgoing carrying out of what seems to be the sound principle that should govern this matter. I do not believe any state in the Union would begin to have such a judicial organization as you would have in Texas with a measure of that sort."

A study of the proposed article shows that the rule-making power and considerable administrative responsibility is lodged in the new, unified appellate court of fifteen members. The district court judges of each district are to work out plans of administration for their court and for the local inferior tribunals under most flexible grants of power. Mr. Dabney's criticism is that he would prefer to see administrative power more centralized. It is on this point only that there is any considerable divergence from the model judicature act of this Society. We believe that rule-making and administrative functions should devolve upon a council of judges representative of both trial and appellate divisions. But we can hardly expect such a great step forward at the first attempt. The scheme as evolved goes a great way and we are disposed to be as optimistic of it in action as Dr. Pound.

The Oregon judicature act published in this number expresses an ideal rather than a serious expectation of immediate adoption and for that very reason makes less compromise with traditions and prejudices. It is interesting to observe that such a sweeping reform is possible of enactment under the liberal terms of the Oregon constitution. The attempt to amend the California constitution to make it similar was emphatically defeated at the polls in November. The people of California must have a definite opinion of their legislature and that opinion is evidently one of suspicion. Since the California State Bar Association fought the proposed amendment it now has a clear responsibility to submit a comprehensive plan for reform. Such a plan would be in the form of a constitutional amendment, legislative in character. The people of that state are accustomed to legislate through amendments to the constitution

*Causes for Popular Dissatisfaction with the Administration of Justice: 29 Am. Bar Assn. (1906) 295-412.

and their temper justifies the opinion that they would approve any definite plan for court reorganization which embodied modern ideas of administrative efficiency, if approved by the bar of the state.

There is encouragement in the obvious fact that the gauge of battle in the past two or three years has shifted from mere procedural reform to the more substantial issues involved in judicial organizations and powers. There are now no states in touch with current thought which look for real progress except through adoption of what is most concisely described as "business management for courts."

It is well understood that procedural reform must come through the rule-making power. But there is a danger that this idea will be held to the exclusion of another even more important. Administrative power is closely allied to rule-making power. It is not all to make rules; they must be interpreted and applied in a responsible manner. And this implies unified organization throughout the judicial system. It is worth while, undoubtedly, to give a supreme court rule-making powers, but if we go only so far we are likely to reap disappointments. Supreme courts everywhere are already overburdened; they exist for other purposes than administration. If the bar of a state informs the legislature and the people that only this is needed to get complete success in the courts they will have to apologize later. Nothing will finally avail but efficiency organization throughout. Constitutional amendments are usually fearfully laborious things, but if they are required, then the sooner we accept this fact the sooner we will be on the road to real success.

Court Reorganization in Texas

A very earnest effort is being made by Texas lawyers to redeem the administration of justice in that state. The Texas State Bar Association has done its part to make possible a thorough reformation of judicial organization and procedure. The responsibility now rests squarely on the legislature.

The old system has practically broken down. It is proposed now, after having tried legislative tinkering for a long time, while conditions were steadily getting worse, to provide such an organization for the judges that they may be able to meet the needs of the situation. The new plan provides for them an efficiency organization and confirms the rule-making power so that details of procedure may be worked out in a consistent and harmonious manner.

The measure supported by the State Bar Association is the most thorough and most modern that has ever reached the

stage of actual submission to a legislature. After wrestling with the problems for a long time, the association, at its July, 1918, meeting, approved almost unanimously a draft judiciary article, which it is believed the present legislature will submit to the electorate. The proposed amendment to the constitution has been published by the association in a pamphlet which contains also an explanation for its need, the entire discussion preceding its adoption, and addresses on judicial organization by Dr. Roscoe Pound and Hon. Emmett O'Neal, former governor of Alabama.

As proof of the need for a great improvement in the state's judicial system the following quotation from the introduction to the volume is offered:

The public is in open rebellion. The best of our judges, working in the present machine, cannot always administer justice. The rightful compensation of lawyers is enormously decreased, their labors in-

creased, and the scope of their useful activities limited by the intolerable expense, complications, delays and uncertainties inherent in the system. To a great extent the courts are being abandoned, because men would rather submit to wrong than to litigate. Therefore the general public, and the professional, demand is for reform, and if the legal profession does not with careful deliberation bring forth a plan, it is inevitable that crude and injurious plans will be advanced, and probable that some of them will be adopted.

Because of the similarity of Texas conditions to those in a number of other states it appears justifiable to print the entire proposed article. While it seems rather long, the introduction declares that it is perhaps somewhat shorter than the present judiciary article.

But first we need to learn something of the system which is yielding such bad results. It is in most respects the system found in many of our states. Texas started with justices of the peace with limited criminal jurisdiction and civil jurisdiction to \$200. Next in the judicial hierarchy is the County court with probate and limited civil jurisdiction. The District court has general trial jurisdiction in civil actions and as to crimes.

When the Supreme Court was unable longer to cope with the volume of appellate proceedings there were created nine Courts of Civil Appeals, each with a chief justice and two judges. The Supreme Court proper comprises a chief justice and two justices; it was in time augmented by the creation of the Court of Criminal Appeals, with three members, and more recently by a Commission on Appeals, sitting in two sections of three members each.

This rigid organization has been especially unsuccessful in the matter of appeals. The load of cases waiting for a hearing has steadily increased, despite the best efforts of the numerous judges, until now the litigant has to expect a wait of about four years. It is a good illustration of the fact that delay in the reviewing department stimulates appeals.

In formulating a new scheme the principles of efficiency organization and of re-

liance on the rule-making power are fully embraced. Samuel B. Dabney, Esq., of Houston, has taken the lead in the constructive efforts. His plan was approved by the state senate several years ago. It has been modified from time to time until it received the unqualified approval of the State Bar Association. In his discussion Mr. Dabney stated that, in its present form, the plan does not go as far as he would wish in respect to concentrating responsibility in the chief justice of the Supreme Court, but he considers the plan the best that can gain legislative approval. The rule-making power is confirmed in the Supreme Court which becomes chief in the administration of the entire system.

Unified Appellate Branch

A complete unification of appellate jurisdiction is achieved. A single Supreme Court of fifteen members is to exercise all appellate jurisdiction. It is composed of the six justices of the present Supreme Court and Court of Criminal Appeals and the nine chief justices of the present Courts of Civil Appeals. The latter courts are abolished and the remaining eighteen judges are required to serve the needs of the trial courts.

This new Supreme Court of fifteen members is to have a civil division of not less than five and a criminal division of not less than three. Appeals are abolished, review being only on writ of error, and in granting such a writ the court "shall designate what portions of the record shall be brought up," thus getting rid of interminably long and expensive records.

"The Supreme Court shall be authorized to call to its assistance, at any time, one or more District Judges, and to assign them to such duties of that court as it may determine, and for such time as it may see fit. When performing these duties the District Judges, so assigned, shall have all the powers of Supreme Court justices and receive the same pay." Correlative to this provision is one which requires justices of the Supreme Court to spend at least one month of each year in District Court trials.

The District Courts are given considerable approach to unification by providing that the Supreme Court shall establish nine or more districts, in each of which there shall be at least seven District Court judges. The little districts are got rid of and the trial courts are afforded the administrative supervision of the Supreme Court. Terms of court are abolished and judges of the District courts are authorized to sit singly, or in divisions of any desired number, as the exigencies of business may require, and to permit of the full utilization of the judicial force both in numbers and in respect to special experience and individual talent. This affords easy opportunity for such specialization as may prove efficient in common law, equity, criminal and other lines of judicial work. No rigid system is imposed. The judges are given an opportunity to do their best and can thus be held responsible for results.

The County Court judges at the present time are members of the Boards of County Commissioners. The draft abolishes the County court and provides in its place a Probate and Juvenile judge in each county, to be selected by the District Court judges of their respective districts, but the first such Probate judge shall be the present County Court judge, who shall also continue to be Presiding Commissioner.

Policy as to Little Causes

The office of justice of the peace is abolished. In its place there is provided a Magistrate's Court for each county, with one or more stipendiary magistrates, as may be needed. The justices of the peace become such magistrates for two years beyond their existing terms of office. As such they will exercise only the criminal jurisdiction of justices of the peace. The District Court judges are authorized to commission the new Probate judge to try civil cases involving less than \$200, in counties in which there is felt to be such a need, and the Probate judge may sit in any part of the county. Terms of court are abolished in these lesser courts as well as in the higher.

The State Bar Association publishes the following comment upon this part of the plan:

We are out of sympathy with the idea that the small or poor or ignorant man should not be entitled to the services of the very best court. No such plan is supported where a right judicial machine prevails. Small litigations can all be set on different dockets or in different divisions of the District Court, and under the flexible system proposed, disposed of with great rapidity. The best systems have abolished the swarm of small courts; they degenerate into pests and tyrannies.

Perhaps one of the boldest changes made is with regard to practice. It is argued by the advocates of the measure that practice should be directory only, and that every constitution should contain, as a part of its bill of rights, or elsewhere, a provision preventing the courts from binding themselves, by technicalities of practice, not to consider the merits of cases. It is insisted that one-third at least of the printed matter of our reports should be cast aside as binding precedents. Consequently there is inserted in the amendment this provision:

Sec. 25. The Supreme Court shall have exclusive power to make and establish rules and the law of pleading and practice, and to reform the same, for the government of that court and all other courts of this State, in order to expedite the dispatch of business and the administration of justice; and to provide for the forms of all writs, notices and process, civil or criminal, and for the method of service thereof, by whom or how to be served, returns; and for the length of time of notice or service, and the methods and forms of taking depositions.

By the term "Pleading and Practice" is not meant any part of the law of organization, for the constitution or organization of courts, juries, or any part of either.

No case shall fall of a decision in the Supreme Court, or in any division thereof, because of non compliance with a rule or law of Practice, if it be possible to make such decision, and maintain the just rights of the opposing party, by provision for the payment of costs or for the giving of security, or otherwise, as the court shall, in each case, decide. Subject to the above, Practice shall be considered directory only, and subject to the above, no case shall fall of decision upon its merits by reason of any rule or law of Practice whatsoever.

A great portion of the amendment is copied from the existing constitution, including existing and construed tautology, and the whole county organization which in Texas is mixed in with the judiciary article, and therefore is repeated in the amendment, as it was thought best not to attempt a more scientific separation, after so much construction.

One great advantage of the amendment is its flexibility. It is no code, and contains no code provisions, except an outline for writs of error. On the other hand, it is obvious that it abolishes part of a vast code, and puts the abolition of all of the balance, at the will of the Supreme Court, as far as pleading and practice are involved.

Under the amendment the Supreme Court of Texas will have no reasonable explanation, if the most rapid administration of justice is not given known to English-speaking people. For a flexible machine is provided capable of indefinite expansion, and practice and technicalities of practice are made merely directory road marks on the road to justice. A vast mass of these technicalities will, therefore, be swept into the dust bin if this amendment is adopted.

It is obvious that under this amendment there will be a great saving of money, both to the taxpayer and to the litigants.

It is no easy matter to reconstruct an entire judicial system. The work of drafting is more perplexing than when an ideal system is evolved. This brief introduction will give a general idea of the nature of the changes proposed. It will be seen that the rule-making power is made the cornerstone of the new system, but the Texas Bar Association realizes that merely conferring rule-making power on a supreme court is not enough in itself to permit of genuinely efficient administration. There is needed also administrative supervision of the system and to this end considerable flexibility is required.

These changes involve unification of separate branches of the judiciary, an increase of administrative powers, and finally freedom to work together under a

common leadership with the power to make rules which will permit the judges to accomplish what they are normally capable of, instead of keeping them apart like a row of fence-posts. Co-operation is the keynote of the successful judicial institution.

All of the judges in the present system are retained and their terms are lengthened and salaries increased, not to gain their support for the measure, but in order to be fair to them and to pay them more nearly what the office properly calls for. The Texas situation is somewhat peculiar in that the judiciary article provides for the county boards and other county officers. The new article makes practically no change in respect to them except that the elimination of an election operates to extend the terms of all incumbents.

Amendment to the State Constitution, Amending Article 5 of the Constitution, Relating to the Judicial Department of the State Government, by Adopting in Lieu Thereof the Following Joint Resolution. (Proposed by the Texas State Bar Association to the Legislature of Texas.)

Be It Resolved by the Legislature of the State of Texas:

That Article 5 of the Constitution of the State of Texas be repealed, and that in lieu thereof the following be adopted: and that Article 5 of the State Constitution shall hereafter read as follows:

Judicial Power Vested in Courts

Section 1. The judicial power of this State shall be vested in one Supreme Court, in District Courts, in Probate Courts, in Commissioners' Courts, and in Magistrate's Courts, and in such other courts as may be provided by law.

Judges Barred from Politics

Sec. 2. No member of the Supreme Court, and no District judge, shall participate in partisan politics, while in office, but they may be candidates for re-election, and may use lawful methods in promotion of their candidacies.

Unified Supreme Court Created

Sec. 3. The Supreme Court shall consist of a Chief Justice and not less than fourteen Associate Justices; until otherwise provided by law.

No person shall be eligible to the office of Chief Justice or Associate Justice of the Supreme Court unless he be, at the time of

his election, a citizen of the United States and of this State; and unless he shall have attained the age of thirty years, and shall have been a practicing lawyer or a judge of a court or such lawyer and judge together, at least seven years.

The Chief Justice and Associate Justices shall be elected by the qualified voters of the State at a general election, for County officers, and shall hold their offices 12 years, and until their successors are elected and qualified; and shall each receive an annual salary of \$6,000.00 and an additional allowance of \$5.00 per day or any fraction thereof, while filling an assignment on the District Bench, including the necessary time of travel for that purpose; until otherwise provided by law.

The Chief Justice and Justices, or Judges of the Supreme Court, the three Justices or Judges of the Court of Criminal Appeals, the Chief Justices of the Courts of Civil Appeals, now existing, and who may be in office at the time this amendment takes effect, shall constitute the Supreme Court until the expiration of their present terms of office under the existing Constitution and law, and until two years thereafter; two years being added to the terms of all of the members of the court; and until their successors are elected and qualified. Should the Supreme Court not be filled to fifteen on its new organization in this way, that court shall fill the vacancy or vacancies until the next general election for County officers, and until their successors are elected and have qualified.

Powers of the Supreme Court

Sec. 4. The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to all cases of which the District Courts have original or appellate jurisdiction, except as herein otherwise provided.

The Supreme Court shall be authorized to call to its assistance at any time, one or more District Judges, and to assign them to such duties of that court as it may determine, and for such time as it may see fit. When performing these duties the District Judges, so assigned, shall have all the powers of the Supreme Court Justices and receive the same pay.

The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus as may be prescribed by the law; and, under such regulations as may be prescribed by law, the Supreme Court, and the Justices thereof, may issue the writs of mandamus, procedendo, certiorari, and such

other writs as may be necessary to enforce its jurisdiction.

The Legislature may confer original jurisdiction upon the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall have the power, upon affidavit or otherwise, as by the court may be determined, to ascertain such matters of fact as may be necessary for the proper exercise of its jurisdiction.

The Supreme Court shall sit from the first Monday in September of each year until the last Saturday of June in the next year, inclusive, at the capital of the State; and may sit at any other time, if the court so decide.

Provided, however, that each member of the Supreme Court shall sit in the District Courts as a trial judge for any length of time, but for not less than one month, as near as may be, during each year; in any county or counties as the Supreme Court may determine, or the Chief Justice thereof, if that court decides to leave the making of the assignments to him, which it may do.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may be hereafter required by law; and he shall hold his office during the pleasure of the Court, and shall receive such compensation as by law may be provided.

Divisions of Supreme Court

Sec. 5. The Supreme Court shall be divided into not less than two divisions, to-wit: A Civil Division and the Criminal Division; but the whole court shall sit when and as herein provided. A Justice may be a member of one or more Divisions, at the same time.

(a) The Civil Division or Divisions—There shall be one Civil Division, but there may be two or more, as the Supreme Court, or Chief Justice, may, from time to time, decide. If there be more than one Civil Division, the cases shall be distributed between them as the Supreme Court, or Chief Justice, may direct. A Civil Division shall consist of such of the Justices, not less than three in number, as may be designated by the Supreme Court, or Chief Justice. All Civil litigations coming before the Supreme Court shall be decided by a Civil Division, except as otherwise herein provided.

(b) The Criminal Division—The Criminal Division of the Supreme Court shall consist of such Justices, not less than three in number, as may be designated, from time to time, by the Supreme Court, or the Chief Justice.

All criminal litigations coming before the Supreme Court shall be decided by the Crim-

inal Division, except as otherwise herein provided.

Appeals Abolished—Writs of Error

Sec. 6. Appeals to the Supreme Court are abolished in all civil cases.

No civil cases shall be reviewed by the Supreme Court, or a Civil Division, except on writ of error; for which the party applying for the writ shall make application to the Supreme Court, assigning the errors of law which he propounds, and stating wherein, if he so contends, the verdict, or the finding of an issue of fact by the lower court, may be unsupported or subject to review, and stating a synopsis of the case, and grounds of error which he may desire to present to the Supreme Court, and controversies over points of law or issues of fact; and otherwise presenting his application under such regulations as may be prescribed by the rules of the Supreme Court.

All statements in the application shall be taken as true, for the purpose of the application; but the applicant may be penalized by the Supreme Court, in favor of the defendant in error, in not over ten per cent, of the amount involved, if the writ be obtained by willful misrepresentation or gross carelessness. No record or verified statement need be made up or presented with the application.

The application and briefs and arguments in support thereof shall be submitted to the opposing party, and may be answered by briefs and arguments, and there may be such oral arguments on applications for writs of error, as the Supreme Court may allow. In granting the writ the court shall designate what portions of the record below shall be brought up; but no statement of the whole evidence shall be brought up, except by bill of exception preserving an exception to the overruling of a request for a peremptory instruction in the lower court, or to the judgment or decree of a judge where there is no jury, and raising the point or points of the sufficiency of the evidence to support the verdict, judgment or decree, provided that the statement shall not extend beyond the issues involved for review.

Applications for writs of error may be submitted to the Civil Division; or may be submitted to and orally argued before one or more of the Justices of the Supreme Court; as the Supreme Court may determine, and be granted by one or more Justices to whom presented; but shall not be refused in whole or on any point, except by a Civil Division, or the Supreme Court.

Criminal appeals to the Supreme Court shall be prosecuted before the Criminal Division of the Supreme Court, on such condi-

tions and under such regulations and restrictions as may be provided by law.

In either Criminal cases, or Civil cases, on application for writ of error as well as after the writ may have been granted, should a Justice of any Division dissent, or certify that he seriously doubts the correctness of the opinion of the majority, or certify that in his opinion a constitutional question is involved, or certify that there is, in his opinion, a conflict in the prior decisions of the Supreme Court or of the Court of Criminal appeals, hereby abolished, or both; then in any such event, the case shall stand reserved to the Supreme Court, as such, without regard to any Division. Upon the resolution of the points of dissent or which are certified, the Court may retain the whole case for final discussion, or send it back to the proper Division for the discussion of the remaining points, if any.

District Courts and Judges

Sec. 7. The State shall be divided into judicial districts by the Supreme Court, not less than nine in number, which may be rearranged, diminished or increased by that court from time to time; but there shall not be less than seven District Judges in any district, not counting any member of the Supreme Court sitting in the District Court; but the same number of judges are not required to be provided for each district; and in any District Court any member of the Supreme Court shall have the right, on designation, to sit at any time, either by himself or with any other District Judge or Judges, and shall have all the power, when so sitting, of a District Judge; and he shall be authorized to so sit by designation as hereinabove provided.

For each judicial district there shall be elected, by the qualified voters thereof, at general elections for County officers, the judges of the judicial district, who shall be citizens of the United States and of this State, and who shall have been practicing lawyers of this State or a judge of a court thereof, or practicing lawyer and judge, for not less than five years next preceding their respective elections, and who shall reside in the district during their respective terms of office.

A District Judge shall hold office for a period of eight years; and shall receive for his services an annual salary of not less than \$4,500.00 and an additional per diem of \$3.00 per day while outside of his home county in the performance of the duties of his office, until otherwise provided by law.

The judges of each district, of whom not less than three shall constitute a quorum for this purpose, shall meet as often as they may see fit to consider the dockets of the

different courts, to designate the District Judges for the holding of the different courts, and to set the terms and dockets thereof.

Terms of the District Courts are abolished, as fixed by statutes, but the district Judges shall hold such terms for such length of time and as often as and as long in the several counties as they may determine, in order to best adjust among themselves the dispatch of business and the speedy administration of justice; and for this purpose the clerks of the several District Courts shall furnish them with lists of cases and data thereon when required. Terms may be set for the whole docket or any portion thereof.

There shall be a District Court in each organized county of this State, to be so designated, and to be presided over by members of the Supreme Court or by the District Judges, or both.

The District Court of any county or any one trial may be held by the Chief Justice or any Justice of the Supreme Court, or by any one District Judge, or by the Chief Justice or any Justice or Justices of the Supreme Court, sitting with one, two or more District Judges, or by one, two or more District Judges sitting together.

When the Chief Justice or a Justice of the Supreme Court may sit with one District Judge, if there be a division of opinion that of the Chief Justice or the Justice of the Supreme Court shall prevail. When two District Judges may sit together, and there be a division of opinion, that of the Judge of longest continuous service shall prevail; and when three or more justices or judges sit together, then the opinion of a majority shall prevail; unless they be equally divided, when the opinion of those of longest continuous service shall prevail.

The District Court of any county may be held by divisions, if, in the opinion of the judges holding the court (there being more than one sitting), the dispatch of business and the administration of justice will be facilitated thereby, the judges sitting separately, or two or more together, in different divisions, and exercising all of the powers of the District Court in each division; and the different divisions may sit at the same time, with full power to adjust and transfer the business between them so as to best dispatch the same. Terms of the District Court may be set for civil business, or for criminal business, or for both, or for any business or case whatever. No District Judge shall sit constantly in the same county, but may always sit, in term or vacation, for the completion of any case commenced before him, receivership, or any matter of legal or equitable administration.

By order the Chief Justice of the Supreme Court may designate judges of the District

Courts to sit in any District and direct in what county or counties they shall sit.

Additional District Court Judges

Sec. 8. The justices or judges of the several Courts of Civil Appeals, now abolished, other than the Chief Justices, thereof, and the judges of the District Courts, the judges of the Criminal District Court of Harris County, the judge of the Dallas Criminal District Court, and judges of all other Criminal District Courts, if any, who may be in office at the time this amendment takes effect, shall become, be, and remain District Judges until the expiration of their respective terms of office under the present Constitution and laws, and two years thereafter; two years being added to each of all their respective terms under the present Constitution; and until their successors are elected and qualified as District Judges; and shall stand apportioned among the Judicial Districts, each to be a District Judge of that judicial district to which the county of his residence is apportioned, by the formation of such districts by the Supreme Court.

District Court Jurisdiction

Sec. 9. The District Court shall have original jurisdiction of all cases, criminal or civil, except those of which the Probate Courts have original jurisdiction, and except as herein otherwise provided.

The District Court shall have appellate jurisdiction and general control in probate matters, over the Probate Courts, for appointing guardians, granting letters testamentary and of administration, probating wills, settling the accounts of executors, administrators and guardians and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be prescribed by law.

Provided, however, that whenever the majority of the District Judges of any judicial district shall decide it to be necessary for the administration of justice, they may, by an order signed by them, and to be entered on the minutes of the District Court of the county, direct that all civil cases not involving slander, libel, land or domestic relations, and less than \$200.00, exclusive of interest and costs, shall be tried by the Probate Judge of that county, with a jury of six men, if demanded, he to have no fixed terms, but to hold court when and at such places as may be determined by him, under the rules of the Supreme Court, and an appeal in all cases over \$20 to be allowed to the District Court, where it shall be tried de novo. A majority of the District Judges

of the judicial district may revoke this order.

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners' Courts, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or this Constitution; and such other jurisdiction, original and appellate, as may be provided by law.

Until it may be otherwise provided by law, no writ of error, in civil cases, shall be allowed by the Supreme Court to the District Court, in cases not involving land or domestic relations, when the amount involved is less than \$150, exclusive of interest and costs, unless a constitutional question be involved.

District Court Clerks

Sec. 10. There shall be a clerk for the District Court of each organized county, who shall be elected by the qualified voters of the county, and who shall hold his office for four years, subject to removal by information, or by indictment of a grand jury, and conviction by a petit jury. In case of a vacancy, a majority District Judges of the judicial district in which that county is situated shall have the power to appoint a clerk, who shall hold until the next general election for county officers, and until his successor has been elected and shall have qualified. The County Clerk may be Clerk of the District Court when and as provided below.

Civil Juries in District Court

Sec. 11. In the trial of all causes in the District Courts the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be impaneled in a civil case unless demanded by a party to the case, and unless a jury fee be paid by the party demanding the jury, for such sum and with such exceptions as may be prescribed by the Legislature. In the trial of any misdemeanors and in the trial of civil cases, not involving land or domestic relations, or an amount, exclusive of interests and costs, of over \$500, the jury shall be composed of six men, in other cases of twelve men.

Disqualification—Assignments

Sec. 12. No judge or magistrate shall sit in any case wherein he may be interested, or when either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been of counsel in the case.

No judge or magistrate shall receive any compensation out of the fees in any case, or any gratuity or gift from any litigant.

When any Justice of the Supreme Court, or District Judge shall be disqualified to hear and determine any case, or cases, in their respective courts, and there be a deficiency of judges through such disqualification so that the administration of justice may be delayed, the disqualification shall be certified to the Chief Justice of the Supreme Court, who shall immediately appoint a Justice of the Supreme Court or a District Judge, or commission a person or the requisite number of persons, learned in the law, for the trial or determination of the cause or causes in which the disqualification may exist. If the chief Justice of the Supreme Court be disqualified for this occasion, the senior Justice in point of service shall act as Chief Justice.

When any judge of a District Court is disqualified, the parties, may, by consent, appoint a proper person to try the case, if a member of the Supreme Court or a District Judge be not available; or, upon their failure to do so, a competent person may be appointed by the Chief Justice of the Supreme Court to try the same, or by the senior Justice of the Supreme Court, in point of service, if the Chief Justice be disqualified.

Style of Process Prescribed

Sec. 13. All judges of courts of this State shall, by virtue of their offices, be conservators of the peace throughout the State.

The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by authority of the State of Texas.

Number of Jurors Required

Sec. 14. Grand and petit juries in the District Courts shall be composed of twelve men, except as provided above as to the petit juries; but nine members of a grand jury shall be a quorum to transact business and present bills.

When, pending the trial of any case, one or more of the jurors, not exceeding three, when there is a jury of twelve men, or not exceeding one when the jury is of six men, may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict.

Probate Judges Provided

Sec. 15. There shall be established, in each organized county of this State, a Probate Court, which shall be a court of record. There shall be appointed by the District Judges of the judicial district in which the Probate Court may be situated, a Probate Judge for each Probate Court in this State, who shall have been a practicing lawyer or

judge, and shall have practiced law or have been a judge, or both, for not less than four years before his appointment; or who shall otherwise be deemed qualified for the office; and who shall hold his office for six years from November 1st next succeeding his appointment, and until his successor shall be appointed and have qualified, and this shall be his term whether appointed to fill a vacancy or not. He shall receive no fees but a salary to be fixed by the Commissioners' Court of each county, and paid by the respective counties. The County Clerk, on the direction of a majority of the District Judges of that judicial district, shall issue a commission to the Probate Judge and record the same on the Probate Minutes.

All of the existing County Judges under the present Constitution, shall continue to exercise the duties of Probate Judges as now provided by law, and may exercise the jurisdiction, by order of the District Judges, hereinabove authorized to be bestowed on the Probate Judges, until their respective terms of office under the present Constitution and laws have expired; and two years thereafter, two years being added to their terms as Probate Judges; and until their successors are selected and have qualified; and the judges of the Probate Courts, as herein provided for, shall only qualify and commence to perform their duties upon the expiration of the terms of the present County Judges, as herein stated.

Probate Court Jurisdiction

Sec. 16. The Probate Courts shall have the general jurisdiction of Probate Courts; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration; settle accounts of administrators; transact all business pertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons; and apprentice minors as may be provided by law; and the Judges thereof shall have power to issue writs of injunction, mandamus and all writs necessary to the enforcement of the jurisdiction of their respective courts. The Probate Judges shall be judges of such Juvenile Courts as may be established.

The Judges of the Probate Courts shall, as continuously as possible, keep their courts open in each county, and at all times as far as the necessities of the business before the court may require. There shall be no terms thereof.

Procedure in Criminal Cases

Sec. 17. Prosecution in the District Court for misdemeanors may be commenced by in-

formation filed by the County or District Attorney, or by affidavit, as may be provided by law. Grand juries impaneled in the District Courts shall inquire into misdemeanors, and all indictments therefor returned in the District Court, falling within the jurisdiction of the Magistrate's Court, shall forthwith be certified to such court having jurisdiction to try them, for trial; and if such an indictment be quashed in the Magistrate's Court, the person charged shall not be discharged, if there is a probable cause of guilt, but may be held by the Magistrate to answer upon information or affidavit.

Magistrates Courts

Sec. 18. Each organized county in the State, now or hereafter existing, shall have one or more stipendiary magistrates as may be decided to be necessary by the Commissioners' Court of each County, or provided by law. The number of magistrates shall only be decreased or increased by order of the Commissioners' Court, the decrease to take effect at the expiration of a term of a magistrate. The Magistrates shall be paid by the respective counties such salaries as the Commissioners' Court may establish, and they shall never receive any compensation out of fees.

The Magistrate or magistrates in each organized county are to be elected for four years, and until their successors shall be elected and qualified; and each shall be elected by the qualified voters of the whole county, and not by precincts.

Each magistrate shall have jurisdiction throughout the whole country, but his jurisdiction shall be limited to criminal matters, and to criminal cases where the penalty or fine to be imposed by law may not be more than \$200.00, and he may have such other criminal jurisdiction as may be provided by law under such regulations as may be prescribed by law.

Appeals to the District Court of each county shall be allowed, in all criminal cases from the Magistrate's Court, under such regulations as may be prescribed. There shall be but one Magistrate's Court in any county. The Magistrates of a county, if there be more than one, shall hold this court by divisions, or may sit together, as the requirements of the business may make necessary, and as they may determine. If they sit together, the opinion of the majority shall determine, and in case of equal division that of the one or more of longest continuous service.

There shall be no terms of the Magistrate's Court, but this court, in each county, shall be open at all times, as near as may be.

Each Magistrate shall be ex-officio a notary public.

In case of a vacancy in the office of a Magistrate, it shall be filled by the County Commissioners' Court of that county until the next election of County officers and qualification of the person elected.

Upon the adoption and going into effect of this amendment the present Justices of the Peace of each county shall become Magistrates, and remain such to the end of their terms and two years thereafter, and until the next general election for County officers, and until their successor or successors are elected and have qualified.

The magistrates shall have such powers as examining and committing magistrates and coroners as may be provided by law, and until changed by law, all powers and jurisdiction in criminal matters, now possessed by Justices of the Peace.

County Commissioners Retained

Sec. 19. For each organized county in this State there shall be elected four Commissioners and one Presiding Commissioner, being five in all, to be elected by the qualified voters of the whole county, or by precincts, as may be provided by law, and each to hold office for four years, and until his successor shall be elected and qualified. The County Commissioners shall together with the Presiding Commissioner as presiding officer, compose the County Commissioner's Court, and shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

The County Judge and County Commissioners, of each county, holding office under the present Constitution, shall remain in office until the expiration of their respective terms, and two years thereafter, and until their successors are elected and qualified, and the County Judge shall be the presiding commissioner and with the County Commissioners shall compose the Commissioners' Court until the expiration of their offices under the present Constitution.

Judicial Salary Protected

Sec. 20. No compensation of a judge or magistrate shall be decreased during his term of office.

County Clerks Provided

Sec. 21. There shall be elected for each county, by the qualified voters, a County Clerk, who shall hold his office for four years, and who shall be clerk of the Probate and Commissioners' Courts and recorder of the county, and whose duties, perquisites and fees of office shall be as prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners' Court

until the next general election for County officers, and until his successor has been elected and has qualified; provided that, in counties having a population of less than 8,000 persons there may be an election of a single clerk, who shall perform the duties of Clerk of the District court and County Clerk. The County and District Court Clerks, and clerks performing the functions of both offices under the present Constitution, shall have two years added to their terms, and shall under this amendment, continue in office as district or County Clerks, or District and County Clerks, until the expiration of their present terms, and an additional period of two years; and until their successors are elected and have qualified.

County and District Attorneys

Sec. 22. A County Attorney for counties, in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, and hold his office for the term of four years. In case of vacancy, the Commissioners' Court of the county shall have the power to appoint a county attorney until the next general election. The County Attorney may represent the State in all cases in the District and Magistrate's Courts in their respective counties; but the respective duties of District Attorney and County Attorney shall be regulated by the Legislature, and shall be the same as they now are under existing laws, until otherwise provided.

The Legislature shall provide for the election of District Attorneys of such number as the Supreme Court may determine and as may be deemed necessary from time to time, and make provision for the compensation of district attorneys and county attorneys; the district attorneys of a judicial district to be elected at large by the electors thereof at a general election of county officers; provided that District Attorneys shall receive not less than an annual salary of \$500.00 to be paid by the State, and such fees or commissions and perquisites as may be provided by law.

County Attorneys shall receive as compensation such fees, commissions and perquisites as may be prescribed by law. All County Attorneys holding office under the existing Constitution shall remain County Attorneys and their terms of office be extended two years and to the next general election for county officers thereafter, and until their successors are elected and qualified.

All District Attorneys or Criminal District Attorneys holding office under the present Constitution shall remain District Attorneys, and their terms of office shall be extended two years and to the next general election

for county officers and until their successors are elected and qualified; and the Chief Justice of the Supreme Court shall assign them to the District Courts of the several counties, and their successors thereafter.

Office of Sheriff

Sec. 23. There shall be elected by the qualified voters of each county a sheriff, who shall hold his office for the term of four years, whose duties and perquisites and fees shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners' Court until the next general election for county and State officers. All sheriffs holding office under the present Constitution shall remain in office on adoption of this amendment, and their terms shall be extended for two years, and until the next general election for county officers and until their successors are elected and qualified.

Removal of Administrative Officers

Sec. 24. County Attorneys, Clerks of the District Courts, County Clerks, Magistrates, Constables and other county officers may be removed by the judge or judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and finding of its truth by a jury.

Rule-Making Power Confirmed

Sec. 25. The Supreme Court shall have exclusive power to make and establish rules and the law of pleading and practice, and to reform the same, for the government of that court and all other courts of this State, in order to expedite the dispatch of business and the administration of justice; and to provide for the forms of all writs, notices and process, civil or criminal, and for the method of service thereof by whom or how to be served, returns; and for the length of time of notice or service, and the methods and forms of taking depositions.

By the term "Pleading and Practice" is not meant any part of the law of organization, for the constitution or organization of courts, juries, or any part of either.

No case shall fail of a decision in the Supreme Court, or in any division thereof, because of non compliance with a rule or law of Practice—if it be possible to make such decision, and maintain the just rights of the opposing party, by provision for the payment of costs or for the giving of security, or otherwise, as the court shall, in each case, decide. Subject to the above, Practice shall be considered directory only, and, subject to the above, no case shall fail of decision upon its merits by reason of any rule or law of Practice whatsoever.

State Has No Appeal

Sec. 26. The State shall have no right of appeal in criminal cases, except from a judgment sustaining a motion to quash an indictment, but in such case, the defendant, pending appeal, shall be released on his own recognizance.

Transfer of Causes

Sec. 27. The Supreme Court shall, at its first session, after the adoption of this amendment, provide for and transfer all business pending in any court, to the court to which jurisdiction is given by this amendment to the Constitution over such business. This may be done by general orders, without specifying the particular case or business.

All cases pending in the Courts of Civil appeals or Criminal Appeals shall be transferred to the Supreme Court and be decided by the Supreme Court, or the Civil or Criminal Divisions thereof as herein provided. All cases pending in the County Courts and all civil cases pending in the Justice's Courts shall be transferred to the District Courts of the respective counties. All criminal cases in the Justices' Courts shall be transferred to the Magistrates' Courts of the respective counties.

Vacancies—How Filled

Sec. 28. Vacancies in the offices of Chief Justice or Justices of the Supreme Court and of Judges of the District Courts and in the office of District Attorney shall be filled by the Supreme Court until the next succeeding general election for county officers, and until the persons elected have qualified. Vacancies in the office of Probate Judge or Clerk of the District Court shall be filled by the District Judges of the Judicial district including the county in which the vacancy arises.

Vacancies in the office of Presiding Commissioner of any Commissioner's Court, or in the office of County Commissioner, or in the office of the County Attorney, or in the office of County Clerk, or in the office of Magistrate, shall be filled by the Commissioners' Courts of the respective counties until the next general election for county officers, and until the persons elected have qualified.

Repeal of Conflicting Laws

Sec. 29. All provisions in the existing laws of the State of Texas in contradiction hereto are annulled and repealed.

Certain Courts Abolished

Sec. 30. The Supreme Court, District Courts and Probate Courts and County Commissioners' Courts and Justices' or Justice

of the Peace Courts, are re-constituted as herein provided.

The Court of Criminal Appeals, the Courts of Civil Appeals, the County Courts, and all other courts whatsoever, not here mentioned, are abolished; except any existing Town or City Municipal Court, with only criminal jurisdiction; these are not abolished, but preserved, with their existing jurisdiction, until otherwise by law provided.

One Election Annulled

Sec. 31. The next election for county officers, now provided for under the existing Constitution and laws, is annulled and the first election hereafter for county officers shall be two years after the time now provided for their election, and thereafter at intervals of four years.

In Effect October 1, 1919

Sec. 32. This amendment shall go into effect on October 1st, 1919, up to which time none of its provisions shall be operative. It shall be self-operative, but if there be a need to do so, the Governor shall promptly call the Legislature in Special session, in order to enact any laws necessary to the efficient working of this amendment. He may do this before October 1st, 1919, after this amendment may be adopted, or thereafter.

Publication and Ballot

Section 33. This proposed amendment to the Constitution shall be duly published once a week for four weeks, commencing at least three months before the special election to be held for the purpose of voting thereon; which election shall be held on the third Tuesday in August, 1919; the publication to be made weekly in a newspaper in each county in the State of Texas in which a newspaper may be published, provided reasonable terms can be made therefor, of which the Governor shall be the judge; and the Governor shall, and he is hereby directed to, issue the necessary proclamation for the submission of this proposed amendment to the qualified electors for members of the Legislature.

At the election all persons favoring this amendment shall have written or printed on their ballots the words "For the Amendment of Article 5 of the Constitution, in regard to the judicial department of the State Government," and those opposed thereto shall have written or printed on their ballots the words "Against the Amendment to Article 5 of the Constitution, in regard to the judicial department of the State Government."

Ten thousand dollars, or as much thereof as may be necessary, is now appropriated to defray the expenses of advertising and holding the election.

Oral Opinions Barred

The opinion in case of *Jones v. Shefler*, 77, Ore. 284, to which our attention is called by an Oregon member of the Society, illustrates very pointedly the evils which flow from a rigidly legislated code, and also the saving to be effected by oral opinions in certain instances.

This opinion takes twenty-five pages, but, in the opinion of the learned justices, it did not deserve to be reported. The last paragraph says:

The evidence in this case is voluminous. The controversy hinges upon questions of fact only. The rules applicable to the facts are fundamental, and are as old as equity jurisprudence. It is not necessary to consider or apply any new or debatable legal principles. The discussion of the evidence is of interest to no one except the parties to this litigation. Although the law requires a written opinion, and directs that it be printed, still no useful purpose is subserved by doing so. The writer attempts to express only his own views by pointing to this suit as a concrete illustration of the need for such a change in the law governing this court as will permit oral decisions, after giving notice to the parties, so as to enable them to be present, in all cases where the opinion will not be useful as a precedent.

Overworked courts of review—and which of them are not overworked—should be able to find a considerable source of saving from oral opinions. This is already the case in some jurisdictions and we are likely to hear of greater reliance on this economical method where the statute and constitution permit it.

Meanwhile judges everywhere should realize that a considerable part of our overgrown mass of legislated procedure represents unwarranted suspicion of the judiciary. No other officials are expected to perform their work in a strait-jacket. When quasi-judicial commissions are created it is common to give them far greater freedom with respect to procedure than is given in most states to judges, and yet, if there could be any virtue in the minutely legislated code, it would apply more strongly to the commissions than to the courts. One reason the commissions have functioned so capably in most instances is that they have had freedom to create their own procedure.

Plan to Unify Oregon Courts

The last Oregon legislature authorized the Supreme Court to appoint seven members of a "commission to investigate and report to the next succeeding Legislative Assembly a plan for the revision and improvement of judicial administration, practice and procedure, with a view to simplification and to reduce the expense and delays of litigation and to promote certainty of justice in judicial proceedings."

The chairman of the commission thus created was Charles H. Carey, Esq., of Portland, recognized as one of the leaders of the Oregon bar. The resolution required the selection of one lay member to represent the "commercial, manufacturing, farming, labor and other industrial interests. Mr. Ben Selling was chosen for this place. The other members were Justice George H. Burnett, representing the Supreme Court, and Attorneys Alfred S. Bennett, W. D. Fenton, E. R. Bryson and Percy B. Kelly.

The commission unanimously reports two acts and submits two minority reports. The first act provides that the chief justice of the Supreme Court shall assign circuit judges to work in any county in which they may be needed. The object evidently is to permit of utilizing country judges in Multnomah county, in which the only large city in the state is located. The second act permits the Supreme Court to call in three circuit court judges to expand the Supreme Court to three divisions of two justices and one circuit judge each.

Mr. Percy R. Kelly drafted one of the minority reports but did not submit any concrete plan. The other minority report bears the signatures of Chairman Carey and Mr. Ben Selling. Inasmuch as it constitutes a complete reorganization of the courts of record of the state, creating a really unified court, with complete administrative and rule-making powers, and provision for discipline, and accomplishes this without a constitutional amendment,

we publish this report in its entirety. Since 1910 the Oregon constitution has contained this clause: "The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law."

Prefatory Statement

The undersigned members of the Commission on Law Reform concur in recommending the adoption of the two bills referred to in the foregoing report, and accordingly have joined in signing the report.

We do so, however, solely upon the ground that those measures if adopted will afford a means whereby the congestion in the Supreme Court and in the Circuit Courts of Multnomah County may be relieved and those courts may be kept abreast of their work. In our opinion the measures will serve a useful but temporary purpose, though they do not go to the root of the existing dissatisfaction with the administration of justice.

While in the main we agree with what is said in the report as to causes for the delay in the courts, we believe that the reason for dissatisfaction lies much deeper, and that the remedy suggested is inadequate.

We find that in a very large portion of the cases heard by the courts there is an absolute failure to secure a final adjudication on the merits and according to right and justice. This is due to the fact that the system is wrong, and judges are compelled to enter judgments and orders that they know will not settle the merits of the controversy, and will leave an unsatisfactory result of the litigation, viewed from the standpoint of ultimate aims of jurisprudence. A large proportion of the cases end badly because of mistakes made in stating the claim or defense, or because of mistakes in the steps necessary to be taken in treading the mazes of procedure. The mistakes are not usually the fault of the litigant or his attorney, but arise because of a wrong guess as to what should be done, although sometimes, no doubt, the carelessness, ignorance or procrastination of the attorney occasions the bad result. Under any proper system it should be the aim and object of the courts to see that such mistakes are rectified, imposing penalties where necessary to punish. In any event, the judge should not be required to see justice defeated because he is compelled to follow a rule or precedent, or

because an error of judgment has been made in presenting the issue.

The objection to a correction of this obvious defect in the present system is, first, that judges ought not to be given power lest they abuse it. But such abuses would not result in more miscarriages of justice than under the present conditions. Secondly, it is objected that the present code contains ample provisions for amendments of pleadings, requiring judges at every stage of an action to disregard any error or defect in the pleadings or proceedings which shall not affect the rights of the adverse party. But the fact is that, whatever the design of these provisions, the majority of the points decided in the courts are points relating to practice or procedure, and the system has become rigid in its practical application. Amendments, recasting the pleadings, bringing in additional parties, conducting the proceedings before the court, all these are so hampered by settled convention and mode as to require court and parties to give more heed to form than substance. The system dominates its votaries. It is too holy to be touched by profane hands, and lawyers and judges have come to believe that it cannot be improved upon.

The people trust various commissions and boards with broad powers of both administrative and judicial character, investing them with full authority to make their own rules of procedure, and yet they tolerate the continuation of the ancient methods of the courts. Judges are trained men, especially selected for their ability and experience. Commissions are not always composed of experts. But commissions exercise jurisdiction in some of the most important and extensive fields of activity, practically without limit and without effective review by appellate tribunals. They make their procedure adapt itself to the duty to be performed, and it would seem that the courts might do likewise.

In judicial proceedings technical errors result in a failure, because the procedure is not adjustable to the conditions that arise. A failure of justice occurs when a fair and final adjudication upon the merits is not secured. And yet many cases result badly because the decision is not rendered upon the real matter in controversy. The responsibility is not that of the party, or the judge, or the lawyer, or the jury, or the legislature; it is the fault of the system which controls them all. Or, the fault may be that of any of them, but with divided responsibility no one can be held to blame, and the defective output of the courts is accepted as a necessity. We believe the system can be improved and should be improved.

The minority members therefore recom-

mend for the consideration of the Legislative Assembly another bill as an alternative, and as a permanent plan for the reorganization of the Judicial System of this State. The purpose of this measure is not only to provide a system whereby judges may be readily assigned to duty where the business is congested, but also a method by which improvements may from time to time be made by the judges themselves in the practice and procedure with a view to simplicity, directness, expedition and a reduction of expense, and especially to secure a greater proportion of decisions upon the merits in litigated cases. At the same time this plan includes the creation of tribunals for the informal adjudication of small claims and for the settlement of controversies by conciliation or advice without litigation and for the adjustment of commercial and business disputes by arbitration. There is attached to this minority report some statistical information relative to the judicial business of the Circuit Courts, from which it will appear that some of the judges have little business. The work is not evenly divided. And it would improve the general plan if the probate business now handled by the County judges was given to the Circuit Courts.

A feature of the proposed plan is the merging of practically all the courts into one court, but with divisions for appellate duty and for circuit duty, the judges being made available for work wherever needed, by and through an Executive Board of the court itself, which may assign judges where required.

An annual meeting of the judges is provided for so that the judicial work of the state can be studied and improved upon. The American Bar Association some years ago organized what is called the Judicial Section of that body, for the purpose of enabling the federal judges to hold an annual meeting. It has proved highly successful and it permits state appellate and federal judges to establish personal relations, and also to confer annually upon matters of general interest in the discharge of the duties of the judicial office, to promote uniformity of decision and to advance and harmonize practice and procedural reforms. The state in somewhat similar manner may have its judges co-operate to improve the system, and so gain the benefit of their united recommendations. A Committee on Discipline is also provided, for although this is not an essential feature of the scheme, it may be deemed useful at times.

But a still more important provision is that investing the judges with what has come to be generally known as the rule-making power, such as in use of late years in the courts of Great Britain and her colo-

nies. This power enables the judges gradually to change the methods of the courts to get results. It puts the responsibility for bad judicial results upon the judges, where it should rest. And it enables the judges, if wise and far-seeing, as great judges have been in other times and in other countries, and as all American judges would wish to be, to bring about the reforms that are necessary if the respect of the people for the courts and for the administration of justice is to be regained.

It is a fact that the court system in the United States remains in static condition without substantial improvement, while in certain other countries it has undergone profound change, resulting in beneficial simplicity and directness that is little short of marvelous when compared with our antiquated methods.

It is, of course, essential that the Chief Justice and his Executive Board under the proposed plan be men of broad vision. Little men will not accomplish much, if anything. The judges must study comparative law and must know what is being accomplished elsewhere. But assuming that the rule making power is given to the judges, it will be for them to rectify the faults of the present system, and if they do not do so, there will no longer be a doubt as to the seat of the fault, or where the responsibility will lie.

It is with some hesitation that we venture to submit this independent report in view of the fact that it must be a minority report.

We have not attempted to catalogue herein all the many defects in the statutes and in the judicial methods, believing that if the judges are given the duty to study and to recommend changes as herein proposed most of these defects will receive consideration and will gradually disappear.

Such amendments should be carefully planned, and should aim at comprehensive and at the same time harmonious reform. For example, it is well known that the courts waste much time and expense in their method of selecting trial juries, days and even weeks being given over to the tiresome repetition of questions by attorneys touching the qualifications of individual jurors. Under the plan we propose, the judges would be able to suggest a reform by statute and rule whereby the court itself would examine the jurors, saving the litigants the right to suggest any particular questions deemed necessary to protect their rights. This particular cause of delay in American courts has been much commented upon and criticised by foreign observers. But it, like many other abuses and inefficient methods now in use, would soon give way if the judges were empowered to renovate and

make efficient the judicial administration, and on the other hand when the changes necessary to accomplish this are adopted there should be other changes in the code of procedure to conform.

We would, however, feel that we had not discharged our duty without thus providing a plan designed to embody some of the reforms proposed and discussed in many Bar Association meetings, and in books, essays, magazine articles and addresses, and as recommended also in essential features by the American Judicature Society, which has made a searching and expert inquiry into the general subject.

Respectfully,

CHARLES H. CAREY,
BEN SELLING.

A BILL

For an Act to reorganize the judicial system and to make more efficient and economical the administration of justice.

Be It Enacted by the People of the State of Oregon:

The Judicial Power.

Section 1. On and after January first, nineteen hundred and twenty —, the Supreme Court of the State of Oregon shall be vested with all of the judicial power of the State and of the people thereof, excepting such as may from time to time be vested in other courts created by law.

Selection and Terms of Justices of the Supreme Court.

Section 2. The Justices and Judges of the Supreme and Circuit Courts consolidated and merged into the Supreme Court as herein-after prescribed shall become Justices of the Supreme Court for the remainder of the terms for which they have been severally elected or appointed, and their several successors shall be elected from time to time as Justices of the Supreme Court for the term of six years and every six years thereafter. Vacancies in the office of Justice of the Supreme Court shall be filled as vacancies in that office are now or may hereafter be filled by law.

Elections from Districts and At Large.

Section 3. The Justices of the Supreme Court shall be elected from the several judicial districts and each shall be a resident of the district from which he is so elected, excepting that successors of the Justices of the Supreme Court holding office immediately prior to the time when the consolidation takes effect shall thereafter from time to time be continuously elected from the state at large, and they may be residents of any judicial district.

Increasing or Diminishing the Number of Justices.

Section 4. The Legislative Assembly may provide for the election of one or more additional Justices of the Supreme Court in any judicial district, upon the recommendation of the Executive Board, and may diminish the number of Justices in any judicial district upon the recommendation of that Board.

Judicial Districts; their Boundaries.

Section 5. The judicial districts as now constituted are continued; but from time to time the Legislative Assembly may alter the boundaries thereof. The several districts shall always be bounded by county lines and shall be as compact as possible.

Qualification of Justices.

Section 6. No person shall be elected or appointed to the office of Justice of the Supreme Court unless he is and has been for at least — years a member of the bar of the Supreme Court in good standing.

Salaries of Justices.

Section 7. The salaries of Justices shall be regulated by the Legislative Assembly, but no salary of a Justice shall be decreased during his term of office. Until otherwise provided the salaries shall be the same as now paid to the Justices of the Supreme Court.

Merger of Constituent Courts.

Section 8. The Circuit Courts, District Courts and County Courts shall be merged into and consolidated with the Supreme Court. All of the powers, jurisdiction and duties of the Circuit Courts, District Courts and County Courts and of the Judges of those Courts, excepting those of County Courts and the Judges thereof in the transaction of County business, shall belong to the Supreme Court and the Justices thereof.

Office of County Judge and of District Judge Abolished.

Section 9. The office of County Judge and the office of District Judge shall, when the consolidation takes effect, be abolished. The persons holding the office of County Judge shall become County Commissioners and they and their successors from time to time thereafter elected or appointed shall have the powers, duties and jurisdiction of County Commissioners with the other County Commissioners of their several counties, and shall be compensated and shall be elected or appointed as other County Commissioners of their several counties are paid or are elected or appointed.

Restrictions upon Justices.

Section 10. No Justice shall sit in review of any decision made by him or in any matter in which he is directly or indirectly in-

terested, or when he is related to any party within the fourth degree of consanguinity or affinity. No Justice shall engage in the practice of the law, or hold any other office of honor or profit, or receive any emolument other than his salary. All votes cast for any Justice for any other than a judicial office shall be void.

Impeachment or Removal from Office.

Section 11. Justices shall be subject to removal as are other public officers of the state, but they may also be removed by the Executive Board in the exercise of its judgment for cause upon the certificate of the Committee of Discipline specifying the unfitness or unworthiness constituting the ground for such removal, and certifying the record of the hearing of the charges.

Organization into Divisions.

Section 12. The Supreme Court shall be organized into two divisions, the Appellate Division and the Circuit Division. The Circuit Division shall be a division of first instance for civil and criminal matters. The Appellate Division shall be a division of final appeal.

The Circuit Division.

Section 13. The Circuit Division shall have the jurisdiction and powers now vested in the Circuit Courts, the District Courts, and the County Courts, excepting those of the County Courts in the transaction of County business. It may exercise all of the judicial powers of the State and of the People thereof not expressly vested by law in the Appellate Division or in some other Court or tribunal created by law and given exclusive powers. The Justices assigned to duty in the Circuit Division shall have the same duties and authority now imposed upon or enjoyed by Circuit Judges, District Judges and County Judges, excepting in the transaction of County business by County Judges.

The Appellate Division.

Section 14. The Appellate Division shall have the jurisdiction and powers now vested in the Supreme Court and such additional jurisdiction and powers as may from time to time be conferred by law. The Justices assigned to duty in the Appellate Division shall have the same duties and authority now imposed upon or enjoyed by Justices of the Supreme Court. In addition to all methods of taking and perfecting appeals otherwise authorized, appeals may be taken by motion upon the original record and papers without transcript or printed abstract or printed briefs, under such general rules as may be prescribed by the Executive Board.

The Executive Board.

Section 15. The administrative business of the Court shall be conducted by an Execu-

tive Board, composed of the Chief Justice and four Justices of the Supreme Court who shall be chosen as herein provided. Every power adequate to that end is conferred upon it. The Chief Justice shall preside at the meetings of the Board and minutes of the proceedings shall be kept. It shall promulgate rules for conducting the judicial business of the court, and common forms for use therein. It shall from time to time prescribe the terms of the court, define the jurisdiction of the divisions except as defined by statute, and shall assign Justices to serve. It shall see that the business of the Court is promptly disposed of and that the Justices are so assigned from time to time as to facilitate the speedy administration of justice in all districts. It shall simplify pleadings, practice and procedure. It shall prescribe requirements for admission to the bar and admit those applicants who shall prove themselves duly qualified. It shall appoint the officers of the Court, excepting as otherwise provided by law. It shall certify annually to the Legislative Assembly such judgments against the state as may require an appropriation. It shall make an annual report to the Secretary of State, containing such statistics and other information relating to the business of the Court as it may deem proper, or as may be required by law, and shall suggest such remedial legislation as it may deem proper.

Annual Meetings of Justices.

Section 16. The Justices shall convene annually in January to elect the Chief Justice, the Executive Board and the Committee of Discipline, and to consider matters relating to the Court. The Justices shall at such meeting make recommendations for the consideration of the Executive Board for the simplification of pleadings and practice and procedure and with a view to hastening the disposition of the business of the Court and to promote justice without undue expense. The Executive Board may call special meetings of the Justices at any time.

Small Claims; Conciliation, Arbitration.

Section 17. The Executive Board shall have power to provide by general rules for the informal adjudication of small claims, and for the settlement of controversies by conciliation or advice without litigation, and for the adjustment of commercial and business disputes by arbitration. Such rules may authorize one or more Justices assigned to that duty to act in conjunction with additional arbitrators to be chosen by the parties as an arbitration committee in commercial and business disputes.

Masters.

Section 18. The Executive Board shall

have power to direct the appointment of masters to dispose of interlocutory and procedural matters with such powers as it shall by general rule prescribe. The Chief Justice shall appoint as masters members of the bar in good standing who shall reside in the district in which they are appointed, and who shall have been admitted for at least five years. The legislature may prescribe the salaries of the masters, but in the absence of action by the legislature the salaries may be prescribed by the Executive Board.

Surrogates.

Section 19. There shall be in every county of the state a surrogate, who shall concurrently with the Justices have the non-judicial functions and powers now possessed by the County Judges and County Courts until modified or enlarged by the Executive Board, and such other powers as the Board may from time to time prescribe, including the power to take the proof of uncontested wills and to issue uncontested letters testamentary and letters of administration or guardianship. The County Clerks of the several counties shall discharge the duties of surrogate in their counties without additional pay unless and until special compensation shall be established by the Executive Board, but they shall not have power to dispose of any litigated matter.

Committee on Discipline.

Section 20. The Justices of the Court shall annually at their meeting in January elect a Committee of Discipline composed of five Justices and two members of the bar who shall have been admitted to practice for at least fifteen years. The Committee shall maintain discipline among the Justices of the Court, the officers and employees of the Court, and the members of the bar, and shall promulgate canons of ethics for the court and bar. It shall have authority, after due hearing, to give reproofs, publicly or privately, to impose fines, to suspend any officer or employee of the Court from office or duty, and any member of the bar from practice, to recommend to the Executive Board the removal from office of any Justice or employee of the Court.

Justices of the Peace.

Section 21. The Legislative Assembly may provide for the election or appointment of Justices of the Peace, excepting in cities and towns having a population of ten thousand or over shown by the last preceding United States census; but all Justices of the Peace shall be amenable to the powers of the Committee on Discipline and the mandates of the Executive Board. Until otherwise provided by law, the office of Justice of the Peace, excepting in cities and towns

having a population of ten thousand or over as shown by the last preceding United States census, shall be continued with all of the powers, duties and jurisdiction incident to such office.

Board of Preliminary Organization.

Section 22. The Chief Justice of the Supreme Court and three Judges of the Supreme or Circuit Courts to be appointed by him, or their successors, together with three members of the bar in good standing who shall have been admitted to practice at least — years and who shall be appointed by the Chief Justice of the Supreme Court, are hereby constituted a Board of Preliminary Organization which shall manage and direct the consolidation of the Courts as herein prescribed. The Chief Justice shall be the president of the Board of Preliminary Organization. It shall adopt a seal for the court; it shall have transferred to the court all the business and records of the courts herein consolidated; and it shall assign the clerks, officers and attendants, of the consolidated courts to duty in the Supreme Court in order to preserve the continuity of judicial business. It may exercise any or all of the powers conferred upon the Executive Board and it shall continue in office until the Executive Board is organized. It may appoint a secretary and may employ all necessary legal and clerical assistants. The Board of Preliminary Organization shall convene within thirty days after the adoption of this Act and shall proceed to discharge its duties with all reasonable dispatch, and shall recommend such legislation as in its judgment may be required to supplement this Act and to promote the simple, speedy and economical administration of justice.

Effect of Consolidation on Pending Business.

Section 23. At the time the consolidation takes effect, all pending causes, civil and criminal, in the several consolidated Courts shall continue in the Supreme Court without necessity of order of transfer, but thereafter all proceedings therein shall be in the Supreme Court and under the name of that Court and under its jurisdiction. All records, files and property of the consolidated Courts shall belong to the Supreme Court. The consolidation shall not have the effect of depriving any person of any right that he would have had if the consolidation had not been effected.

Repeal of Inconsistent Acts; Liberal Construction Enjoined.

Section 24. This Act shall be liberally construed and applied to accomplish the general object of improving the administration of justice, by simplifying practice and procedure, and empowering the Courts to take all needful steps to avoid the involun-

tary dismissal of litigated causes without a hearing upon the merits, and to give to litigants a prompt hearing and a speedy final decision. Chapter 355 of the General Laws of 1915, and all amendments thereof, and all acts and parts of acts inconsistent herewith, are hereby repealed, such repeal to occur and be operative at the time the consolidation takes effect as prescribed by this Act.

Organization of the Bar

Probably no other article printed in this JOURNAL has met with more immediate response than that in the December number on the subject of bar organization. It appears likely that the subject will command attention in several states during the next year or two. In California the State Bar Association (prior to the article referred to) created a committee to work on this problem. It is evident from letters received from a number of members that there has been a good deal of unspoken reflection upon the matter of making state bar associations representative of the entire profession.

We have received an interesting letter touching on a very narrow angle of this big subject from a Connecticut member:

I wonder if the American Judicature Society, which is doing so much for the organization of courts on a rational basis, could do anything with the subject of courthouses. The administration of justice requires suitable courthouses for its courts, and I am not at all satisfied with the condition of things in this country as regards courthouses. The matter was brought to my attention by the fact that we have recently built in New Haven a courthouse which is a magnificent marble temple, but which is sadly lacking in suitable accommodations for the bar. We are now just about to dedicate a new Federal building which is both a postoffice and a United States courthouse, where the courtroom arrangements were planned without consulting the District Judge, and so far as I know, without consulting any member of the bar. Not many years ago I attended the dedication of our Supreme Court building at Hartford. The bar had no part or place in any of the ceremonies. As you know, there are many tendencies at work to lower the standing of the profession of the advocate. The conditions of practice tend to discourage litigation, and the conditions of litigation tend to discourage lawyers from going into court. To my mind, it would be of great

value to the profession if in the construction and arrangement of courthouses, more attention were paid to the reasonable requirements of the bar, and if in the dedication of our temples of justice the bar should have a recognized place and part. If conditions are as I have described in an old conservative State like Connecticut, they must be even more unsatisfactory in some other places. Osgoode Hall at Toronto, which, perhaps, you know, is not an extraordinary building, but is planned with reference to the needs of the bar. When I entered the new Superior Court building in Albany the other day, I was really surprised to find that a coat-room was provided for lawyers, such a simple convenience being usually lacking. To my mind the bench and the bar should determine the internal arrangement of the building, whether the political authorities who contract for its construction, give its exterior a classical or a Gothic form. It is all very well to have a courthouse stand as a public monument, but there is no reason why at the same time it should not be a

suitable workshop for the advocate. The Judicature Society is doing some practical work in remedying the very serious defects in our administration of justice. Whether it or the American Bar Association would be the better organization to consider the question of courthouses is a matter which I submit for your consideration.

Architects are always anxious to meet the needs of all interests, and if they appear to neglect the lawyers in their courthouse plans it must be because the bar has not sufficient integration to present its needs. It is impossible to suppose that a properly organized bar would fail to receive due consideration at the hands of building committees and architects. More can be learned from Ontario than merely suitable accommodation for advocates, but as to that we must wait for space in some future number.

Act to Provide for Conciliation

Discourage litigation.

Persuade your neighbors to compromise whenever you can.

Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time.

As a peace maker the lawyer has a superior opportunity.

—Abraham Lincoln.

The first step toward an amicable settlement of controversies lies in the frank telling, by both parties, of all they know about the matter. But unless some sort of protection is offered, potential litigants cannot afford to tell all of their cases. Under our system it is often safer for them to reserve something, and the result is that efforts to reach a settlement, though made in good faith, are often frustrated.

The principle of conciliation, which should occupy a conspicuous place in any complete system for administering justice, implies a neutral ground where parties to a controversy may meet without prejudice and disclose every material fact. Conciliation procedure along these lines has been in effect for more than a century in Scandinavian countries and has earned such high regard that nothing could induce the people of those nations to abandon the custom.

Figures covering a considerable period show that eighty per cent. of the controversies submitted to conciliation procedure in Norway are amicably adjusted.

The machinery and procedure of conciliation are extremely simple and inexpensive. The principle is applicable to nearly every kind of civil controversy. Why should not every claimant deem it a natural and inalienable

right that he should be permitted to meet and negotiate with the person who has wronged him before going to the trouble of suing? Why should not every potential defendant consider himself entitled, as a matter of simple justice, to an interview with his claimant before he is put to the expense and annoyance of defending an action?

While there is always a possibility of settlement before actual trial, to be most effective the attempt at conciliation should be as early as possible in the history of the dispute. And since substantial justice is to be obtained in a majority of cases if conciliation procedure exists, and the courts are interested in reducing the volume of litigation by all proper means, it appears to be properly a judicial function to supervise conciliation procedure. By beginning a little earlier in the development of legal controversies the courts can save themselves a great deal of needless work and confer great social benefits.

The following act has been drafted with this theory in view. It suggests a method for making conciliation procedure practical on a state-wide basis. There is only one state in which any attempt has been made to encourage conciliation; that state is North Dakota. The plan there failed because of the wholly impractical system which was created. The subjoined draft is made with special reference to the judicial system of North Dakota, but with slight changes it can be adapted to most other states.

Briefly, the plan is that no civil action shall be commenced (with a few exceptions) until the claimant shall have given the opposing party an opportunity to discuss a settlement in the presence of an assistant of the court known as a conciliator. If the party complained of does not appear in response to the request the conciliator certifies that the attempt at conciliation has been made and has failed, and the claimant is then entitled to obtain process. If he does appear it is then the duty of the conciliator to hear the statements of both parties and their witnesses and to counsel an amicable settlement agreeable to law and equity. If a settlement is reached the conciliator will certify it to the court, which will docket it as a judgment. If there be no agreement the certificate of failure will be granted. The disclosures made at the conciliation hearing are not admissible as evidence in any subsequent proceeding. The conciliator is presumed to be a person of good judgment and good social intent, representing the principal trial court and answerable to it for all his acts. With this brief explanation, let us pass on to the proposed act.

CONCILIATION ACT

An Act to Provide for the Conciliation of Controversies

Be it enacted, etc.

SECTION 1. **Conciliation Boards created.]** It shall be the duty
 2 of District Court judges to establish a Conciliation Board in each
 3 county of their respective districts within ninety days from the
 4 taking effect of this act. Each such Conciliation Board shall con-
 5 sist of such number of Conciliators as the District Court judge for
 6 such county shall determine, and he shall have power to increase
 7 the number thereof and to remove Conciliators at his pleasure,

8 but at no time shall there be less than five members nor more
 9 than twelve members on any such board. These numbers shall
 10 not include the County Court judge, who shall be an *ex-officio* mem-
 11 ber of the Conciliation Board for his county.

In North Dakota the District Court possesses all civil trial jurisdiction, except in probate matters, which are in the hands of county judges. Justices of the peace have civil jurisdiction concurrent with the District Court to the amount of \$200. On the theory that conciliation procedure is properly a function of the courts—a step essential to sifting out immaterial and unnecessary controversies—the act provides that District Court judges shall select and remove conciliators and have a general supervision over their acts.

This should get rid of the partisan difficulties at the outset as thoroughly as they can be avoided. No official can have a more immediate and at the same time more impersonal interest in the welfare of conciliation than the District Court judge, so it may be presumed that he will be best able to select persons who possess the needed qualities.

The North Dakota constitution, sec. 120, contains the following: "Tribunals of conciliation may be established with such powers and duties as shall be prescribed by law, or the powers and duties of such may be conferred upon other courts of justice; but such tribunals or other courts when sitting as such, shall have no powers to render judgment obligatory on the parties, unless they voluntarily submit their matters of differences and agree to abide the judgment of such tribunals or courts."¹

The creation of a "conciliation board" for each county is possible under the quoted language. It is not necessary that the entire board should participate in every hearing. If such were the case a number of small boards would be needed for every county and in a thinly populated district this would call for altogether too much machinery.

Probably in most instances a single conciliator will suffice. This will result in ideal simplicity and economy. But it is provided in a later section that a conciliator can call in one or more of his colleagues to assist him when he so chooses. He should be the person to determine the need. If found desirable, the plan of having two or more conciliators present can be employed regularly.

The numbers specified are arbitrary. Possibly more than twelve might be needed for certain large counties, but it is desirable not to make conciliators too numerous. The position is one of civic honor and should not be impaired by making it too common.

SECTION 2. Eligibility and compensation.] Every person having the qualifications of a voter shall be eligible for appointment as Conciliator for the county in which he resides. Any member of the bar who acts as Conciliator shall not thereafter appear, in any subsequent proceeding, on behalf of either party to any contro-

¹Vid. Wisconsin Constitution, Art. VII, Sec. 16. "The legislature shall pass laws for the regulation of tribunals of conciliation, defining their powers and duties. Such tribunals may be established in and for any township, and shall have power to render judgment to be obligatory on the parties, when they shall [sic] voluntarily submit their matter in difference to arbitration, and agree to abide the judgment, or assent thereto in writing."

6 versy submitted to him as Conciliator. It shall be unlawful for
7 any Conciliator to receive any compensation whatsoever for his
8 services as such, but the necessary forms and stationery shall be
9 furnished to Conciliators by the clerks of the District Courts of
10 the several counties.

The way to get the best material is not by prescribing qualifications, but by providing the right authority for selection. Lawyers should not be barred, because they are better fitted than laymen for this service and in most communities there are lawyers and retired judges who will be willing to render this service.

The question of compensation is one of the most difficult. It is hard to see how fees can be adapted. A small salary, commensurate with the time required, would merely serve to attract the candidacy of the unfit and subject the appointing power to needless solicitation.

It is believed that the office will attract higher talent and command greater honor if it carries no cash emoluments. We have an analogy in the charters of certain cities which pay nothing for their council members. The experience there has been that the change from low salaries to none immediately permits of obtaining the services of a higher type of officials. Under the plan of the act no conciliator is compelled to act, and presumably none will serve at any given time if it causes him serious inconvenience. If no conciliator can be found convenient to the claimant, then he can avail himself of the services of the County Court judge, who is made conciliator *ex officio* for this purpose.

SECTION 3. **Appointment and oath.]** Conciliators shall be ap-
2 pointed and removed by order of the District Court judges for the
3 counties in which they reside, entered upon the docket of the Dis-
4 trict Court for each county. Within ten days from the date of
5 their appointment, and before entering upon the discharge of their
6 duties, they shall take an oath of office prescribed by the judge
7 appointing them.

SECTION 4. **Organization.]** The District Court judge shall be
2 chairman *ex officio* of the Conciliation Board in each county of his
3 district. He shall call such meetings of Conciliators as he shall
4 deem proper, preside over such meetings and instruct Concilia-
5 tors in respect to their duties. Upon his request any such Concil-
6 iator shall make report to him in writing of his official acts.

The power to require special reports will permit of making up statistics. It might be well to provide in the act for statistical reports from all conciliators quarterly or annually, to be published by the state.

SECTION 5. **Conciliation proceedings prerequisite to process.]**
2 After the expiration of said ninety days no process shall be is-
3 sued in commencement of a civil suit by any justice of the peace
4 or by any other trial court unless the moving party shall file in
5 court a certificate of a Conciliator showing that an attempt has

6 been made to effect a settlement of the claim and that such at-
7 tempt has failed; but the foregoing shall not apply to suits com-
8 menced by attachment or replevin, or to applications for injunc-
9 tion or the writ of quo warranto. Provided, however: that any
10 District Court judge in chambers may in a particular instance,
11 on a proper showing, direct the issuance of any such process in
12 any trial court without recourse to conciliation proceedings.

It is difficult to define the actions in which conciliation would be purely formal and inappropriate. There are, of course, some controversies which could not benefit by conciliation procedure, such, for instance, as those in which a legal determination is essential. Conciliation should prove decidedly successful in cases of defamation and personal injury. In some cases of marital controversy it might be the one thing most needed, while in others it would be inappropriate. An order of the District Court judge in chambers will extend the list of exceptions suitably.

SECTION 6. Application for conciliation.] Any person presum-
2 ing to have any civil claim not specified as an exception in Sec-
3 tion 5, before commencing suit, shall request one of the Concilia-
4 tors for the county in which he resides, or in which the person
5 complained of resides, to act as Conciliator. Thereupon such Con-
6 ciliator, if qualified and able to act, shall summon by letter or tel-
7 ephone or personally the party complained of to appear before
8 him at a time certain. Upon the hour set for such conciliation
9 hearing, if the parties are present, it shall be the duty of the Con-
10 ciliator to hear the parties and their witnesses and to endeavor
11 to effect an amicable settlement of the controversy agreeable to
12 law and equity. Conciliators may, in their discretion, administer
13 oaths and require statements under oath. They shall make no rec-
14 ord of the evidence adduced, and no parts of the proceedings shall
15 be admitted as evidence, or considered at the trial of the case, and
16 no Conciliator shall be competent as a witness in respect thereto
17 in any subsequent proceeding.

The party deeming himself aggrieved is made the moving party. If he be one who is threatened with suit he need not act, because his opponent will have to give him his day before the conciliator. The question of service it made discretionary with the conciliator. It may be that looseness in this matter will sometimes result in omission of service, but the consequences will not be serious, whereas inflexible rules regarding service are certain to raise many embarrassing questions. Hearings may be held in the evening and at any place designated by the conciliator. The reason for making the disclosures inadmissible as evidence in subsequent proceedings is obvious. It permits the parties to tell all they know with no fear of a loss of tactical resources.

SECTION 7. Change of venue.] At the time of the first hearing
2 and before proof has been submitted by any party, the parties
3 may by mutual agreement elect to submit their controversy to an-
4 other Conciliator than the one first selected; and in such case the

5 first Conciliator shall dismiss the proceeding and make no record
6 or report thereof.

In some instances the party complained of may have a real or imagined objection to the particular conciliator selected, so that he will refuse to attend the hearing, but be willing to disclose his case to some other conciliator. In such case the parties should be able to stipulate for submission to another conciliator to be agreed upon by them. It is highly important that the parties have entire confidence in the impartiality of the conciliator.

SECTION 8. **Continuances.]** Conciliators shall have power to
2 continue their hearings from time to time to meet the conven-
3 ience of the parties.

SECTION 9. **Conciliators may sit together.]** Conciliators shall
2 have power to request the assistance of other Conciliators of
3 their county in any conciliation proceeding, and in case two or
4 more Conciliators officiate in respect to any controversy any one
5 of them may certify the proceedings on behalf of all.

This permits of two or more conciliators acting together, which may be desirable on occasions. It should supply the need, if any there be, for the services of a board rather than of individual conciliators.

SECTION 10. **Conciliators not obliged to serve.]** No Conciliator
2 is obliged to act in any given controversy, and shall not act if he
3 has any interest in the controversy or is a member of the immedi-
4 ate family of either of the parties, unless consent is given. In case
5 no Conciliator convenient to the moving party is obtainable then
6 the County Judge of that county shall act as Conciliator.

This section absolves a conciliator from serving if he is unable to spare the time; it appears to be correlative to the plan of voluntary service.

SECTION 11. **Conciliator's Report.]** In every case in which a
2 Conciliator shall serve he shall forthwith certify to the District
3 Court for his county the terms of the agreement, if any be effect-
4 ed. The report shall describe the claimant's demand and embody
5 the terms of settlement, bearing the signatures of the parties. It
6 shall be entered upon the docket of the District Court and thence-
7 forth shall have the full force and effect of a judgment of the said
8 court, but shall be subject to any terms concerning its satisfaction
9 which the parties shall have agreed upon, and subject to the law-
10 ful orders of the judge for such District Court.

When a settlement is reached the agreement must be reduced to writing with sufficient description of the claim to identify the matter as *res judicata*. The parties must sign the agreement, and the conciliator then certify it to the court.

SECTION 12. **Failure to agree.]** In case the party complained
2 of shall fail to appear at the conciliation hearing or for any other
3 reason there shall be no settlement of the controversy by agree-
4 ment of the parties, then the Conciliator shall give to either or

5 both parties, upon request, his certificate to the effect that an at-
6 tempt has been made in good faith by the moving party to effect
7 a settlement of a controversy, which shall be concisely described,
8 and that the attempt has failed.

In some instances where there is a failure to agree, both parties will consider themselves entitled to sue, and a certificate of failure should issue to each.

SECTION 13. **Personal appearance.]** The parties to all concili-
2 ation proceedings shall appear in person, except that, for good
3 cause shown, the Conciliator may permit a party to be represented
4 by another person, not a member of the bar. In order to be so
5 represented the party unable to appear shall authorize his repre-
6 sentative to appear and act for him in effecting a settlement of
7 the controversy by agreement, or by arbitration, if the represent-
8 ative shall so elect, and shall be bound by the acts of his repre-
9 sentative the same as if he were present in person.

While highly desirable, personal appearance will not always be possible. It is difficult to formulate the possible reasons in support of appearance by an agent. The conciliator will prefer to deal directly with the parties and can be trusted to exercise a proper discretion in granting permission for appearance by a representative.

SECTION 14. **Arbitration by conciliator.]** Whenever both par-
2 ties shall agree in writing to submit their controversy to a Con-
3 ciliator for his determination as arbitrator, the Conciliator shall
4 receive the evidence and within five days make his award, which
5 award shall be filed in the District Court for that county and be
6 entered upon the docket as a judgment by award and shall have
7 the full force and effect of a judgment of such court.

Conciliators will in time command public confidence, and it will not be uncommon for the parties to agree to submit their disputes to arbitration. It would be well if the conciliators could give judgment summarily in cases involving very small amounts, as is done in Denmark, but this is not possible under most of our constitutions. The opportunity for arbitrating will take care of a considerable share of the cases, especially when the parties are unable to agree but sincerely wish to avoid litigation.

It may be suggested that matters not "justiciable" will be submitted under this act. There are many such disputes which courts cannot deal with except through conciliation proceedings. Having no such procedure, these matters have not been dealt with. They have had no forum. Instead of looking upon them as embarrassing the machinery of conciliation we should congratulate ourselves that a means has been devised for settling these annoying disputes.

The Journal of the American Judicature Society for June, 1918, contains an account of the success of conciliation tribunals in Norway and Denmark, and of experiments in this field in Cleveland, Minneapolis and elsewhere. This number of the Journal will be sent free to any person requesting it. Address: American Judicature Society, 31 W. Lake St., Chicago.

Emphasis on Organization

For years much of the ablest and most progressive and constructive thought in this country has been given to the perfecting of our executive and legislative machinery—municipal, county, state and national. The slogans of a dozen efforts along these lines are household words throughout this land. The "short ballot," "the commission form of government," the "city-manager" plan, civil service reform, the coupling of power with responsibility, the introduction of expert handling of matters requiring expert knowledge, "proportional representation," reduction in the size of local legislative bodies, enlarging the unit from which its members are elected—these are some of the phrases which summarize a quarter-century of constructive effort for the mechanical improvement of executive and legislative departments. The significance of these suggestions is well taught in our colleges, but parenthetically may be interjected here the first query: *Have we given, are we giving, similar attention to the perfecting of the organization of our judicial establishment?*

Justice poorly administered may be justice wholly denied. If the organization and procedure of the judicial branch of government is not kept abreast of the needs and experience of the times, of little avail may be the good intentions or the ripe learning of individual judges or the sociological acceptability of the legal doctrine they expound. It may be added that the course of judicial decision in this country during the past five years confirms strongly an observation which I think may also be drawn from the whole history of Anglo-Saxon jurisprudence, viz., that legal doctrine, as such, is far more flexible, adaptable, susceptible to wholesome influences which make for timely conformance to changed social standards, than is the machinery of jurisprudence, the organization and procedure of the courts. I have accordingly come to believe that a large part of the present-day dissatisfaction with justice as administered by the judicial branch of govern-

ment is due to the consequences of *poor organization and unavoidable procedure*, rather than dissatisfaction with the law as such.—William L. Ransom, former Justice of the City Court of New York City.

Unnecessary Litigation

At the Conference of State and Local Bar Associations held in Cleveland in August, 1918, the subject of preventing unnecessary litigation was presented by Daniel S. Remson, of the New York City Bar, who has served as chairman of a committee on this subject created by the New York County Lawyer's Association. After discussion, the following resolution was adopted:

Resolved, That the Conference of Delegates of the American Bar Association and of State and local bar associations hereby recommends that the various State and local bar associations of the United States co-operate with individuals, State and local Chambers of Commerce and other organizations in the prevention of unnecessary litigation along the following lines:

1. By issuing suitable literature and providing suitable speakers to address business organizations.
2. By emphasizing the importance of clients consulting counsel freely before the facts upon which a dispute can arise have become fixed.
3. By encouraging lawyers and laymen to co-operate in the preparation of the best possible legal instruments.
4. By encouraging and by making known the fact that they are encouraging the settlement of disputes out of court as far as practical, and
5. By urging the bar and business men generally to pull together in each locality for the prevention of unnecessary litigation.

And in so doing it is further recommended that the work of the various State and local bar associations be, so far as practical, coordinated and standardized, and that a special committee of five be appointed for that purpose.

That a copy of the Rules for the Prevention of Unnecessary Litigation, referred to by Mr. Remson, and a transcript of his address and that of Mr. Bernheimer be sent out by this Conference, or by the American Bar Association, to all bar association presidents and secretaries in the country and to all Chambers of Commerce or similar boards, in order that the suggestions therein contained may be brought to the attention of those bodies.

American Judicature Society

To Promote the Efficient Administration of Justice

31 W. Lake St., CHICAGO, ILL.

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List of Publications

Price of each, 25 cents; Stamps accepted

Bulletin IV-A—Second draft of so much of the Metropolitan Court Act as relates to the Selection and Retirement of Judges. This applies in large part to courts outside of large cities. Pp. 127.

Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 84.

Bulletin VI—Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; Local Courts of Limited Jurisdiction (for rural counties), by Herbert Harley. Pp. 68.

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Journal

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American Judicature Society

To Promote the Efficient Administration of Justice

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American Judicature Society

Editorial

If American ideals and the government of our fathers is imperiled by the inferno of discontent uncovered in Europe we shall need more than any other thing an abiding faith in the honesty and understanding and justice of our courts. But to reform our tribunals and their procedure to meet practical demands, because we stand in fear of upheavals in a trembling social system, is craven. We should make our courts the real haven of the victims of injustice, not through fear, but because of an innate love of justice, of fair play, of peace and social equilibrium resting on justice itself, the only safe foundation.

As we take stock of ideas and emotions after emerging from the war, there are certain reflections which are all but universal. We are impressed more than ever that we have a country worthy of every sacrifice. We are impressed more than ever with the conviction that there is no legal or social problem which cannot be coped with when the people of this nation determine to do something which needs to be done. We have increased experience in accomplishment through organization. And finally we all are inspired with a determination to continue our civic devotion.

In the cases of most people this determination is doomed to wither and die. We cannot keep the war pitch forever, nor is it to be desired. Many persons will find no place where their inspiration can be put to work, and others will misapply their devotion.

In this respect the lawyer is more fortunate. His own field offers abundant scope for all his powers and good will. There are few localities indeed where there is no opportunity for engaging forthwith in work for the betterment of the profession and of the public generally.

It is true that this work is less emotional and less spectacular than making four-minute speeches. It does not bring immediate applause. It calls for a long enlistment. But it does afford an immediate outlet for good intentions and it promises returns which are certain and ample.

An attempt is made in this number of the JOURNAL to show the relationship of such matters as court organization, procedure and the selection of judges to a comprehensive programme of judicial reform. All of these things are elements of a machine for administering justice.

We can imagine a protest from some readers at this point. "Can real justice be a machine product?" we hear them ask. "No machine can be better than the men who constitute it. We have too much machinery of justice now and the alleged justice which is turned out is too mechanical."

It is true that we have too much machinery of justice. It is true that the product is often mechanical, measuring up to arbitrary standards but falling far short of the standards of conscience.

It is not more machinery that we ask, but less. It is wholly inconceivable that any person would deliberately impose upon a modern state such a complex and patched-up machinery of justice as we have inherited. Our work is to simplify.

Admitting that we cannot get justice solely from a system however efficiently designed, it is just as true that without system, without an efficient machine, it is impossible to get real justice, however willing and capable the judges are.

Not all of our judges are capable, but most of them are, and all but a negligible minority have good motives. We have had no opportunity to gauge their real capacity

because the conditions of their work effectually prevent them from doing their best. The first step forward is obviously to better their environment—in other words, to create an efficient judicial machine—and give them a chance to make good.

When one studies the complexities and absurdities of the present system he is inclined to absolve the judges from blame. It is rather a wonder that results are not worse in a decentralized, unmanaged system which forbids sensible co-operation between judges and separate tribunals, which has no central brain, no nervous system and no memory.

It may be observed that we thoroughly organized the essential judicial functions at an early stage. There is never much doubt about the course of appeals. But with the growth of population and the concurrent increase in the number of courts and judges, the administrative side of the work has come to assume large proportions. It is this phase which suffers from lack of co-ordination. The proposal is to leave our successful organization of the essential judicial function untouched and organize the administrative function.

The proposal looks to the increase of judicial powers to be exercised under a simple and effective organization plan. This increases the dignity of the bench and restores responsibility, which has been all but dissipated under a system that ties the courts with the thousands of strands of legislated rules. The proposals make for an increase in the substantial independence of the judge in his strictly judicial function.

After we have established a workable piece of judicial machinery it will be in order to forget the wheels and shafts and center our attention upon the product. Opportunities will surely arise then for achieving justice of a standard now conceived of by only a few.

Protracted Litigation

In reading of the famous instances of litigation which continued through generations we are prone to believe that such things belong to the remote past and could never occur in these brisk and businesslike days. Yet the opinion in a recent bankruptcy case (*In re Sweetser*, 240 Fed. 174, decided October 30, 1914) begins with these words: "This matter relates to the final account of the assignees in bankruptcy of Elbridge L. Sweetser, who was duly adjudicated bankrupt on his own petition in this court July 23, 1878." A single matter, the refusal of the assignees to retire in favor of trustees, is said by the court to have produced "litigation of an amount, persistence, and virulence fortunately rare in the history of the law." That matter alone appears nine times in the *Federal Reporter*, twice in the United States Supreme Court reports, and once in the Massachusetts reports, besides "several long opinions which were not published." It appears in the course of the

opinion that at a time thirteen years before its date "most of the claims proved in bankruptcy against Sweetser were in the hands of other persons than the original creditors, a substantial part of them having been purchased upon speculation for a very small proportion of their face value." The court says, apparently without humorous intent, that "the act of 1867 contemplates a speedy liquidation of the bankrupt's property." Compensation in the sum of \$6,750 in addition to that allowed by statute is awarded to the assignees, the total estate being apparently something less than \$20,000. There is nothing to indicate that any person connected with the proceeding failed to act with honesty and good faith, so that whatever of injustice resulted from the long delay and high cost of a proceeding which the lawmakers intended to be speedy must rest on the system itself. But the case certainly gives point to Dr. Wigmore's advocacy of a judicial superintendent with power to come in and do a little vigorous investigating. —*Law Notes*, July, 1918.

Our Comprehensive Programme

Defects in the administration of justice vary greatly throughout the country both in kind and degree. Difference of opinion concerning these defects is partly geographical and partly temperamental. There is little to be gained by controversy in this part of the field. We can more profitably devote thought to the causes for these shortcomings and to practical, comprehensive and consistent plans for their eradication.

Yet there are some versions which compel attention. Elihu Root, in his president's address to the American Bar Association in 1916 revealed in a few words one of the underlying causes and offered a constructive proposal. Mr. Root said:

"The bar and the people of the country generally proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously we all treat the business of administering justice as something to be done for private benefit, instead of treating it primarily as something to be done for the public service. . . .

"A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective."

The minority report of the Oregon legislative commission on courts and procedure (1919) presented a diagnosis which appears to fit the symptoms in a great many states where conditions are looked upon by many excellent lawyers as passably good. Let this quotation indicate the attitude:

We find that in a very large portion of the cases heard by the courts there is an absolute failure to secure a final adjudication on the merits and according to right and justice. This is due to the fact that the system is wrong, and judges are compelled to enter judgments and orders that they know will not settle the merits of the controversy, and will leave an unsatisfactory result of the litigation, viewed from the standpoint of ultimate aims of jurisprudence. A large proportion of the cases end badly because of mistakes made in stat-

ing the claim or defense, or because of mistakes in the steps necessary to be taken in treading the mazes of procedure. The mistakes are not usually the fault of the litigant or his attorney, but arise because of a wrong guess as to what should be done, although sometimes, no doubt, the carelessness, ignorance or procrastination of the attorney occasions the bad result. Under any proper system it should be the aim and object of the courts to see that such mistakes are rectified, imposing penalties where necessary to punish. In any event, the judge should not be required to see justice defeated because he is compelled to follow a rule or precedent, or because an error of judgment has been made in presenting the issue.

Judge Edgar A. Luce of the Superior Court of San Diego county, California, in commenting recently upon delays in the appellate courts of his state, said:

The present system is wholly bad for litigants and almost equally bad for lawyers. Were it possible to obtain the final adjudication of a case within a period of six months after its commencement, litigants would not be required to settle it out of court, at a loss, but could settle their disputes in the courts of justice, where they should be settled, and could do so at a real profit and benefit to themselves. In other words, they could afford to litigate their just claims; consequently, the standard of the legal profession would be raised, particularly in the estimation of the public, and there would be an increased practice of the law, to the mutual benefit of litigants, lawyers, courts and the public generally. Under the present system the legal profession is deteriorating, for the reason that litigation has become unpopular, unnecessarily burdensome and extremely unsatisfactory. It has caused the creation of commissions to take over the work of the courts, because of the greater speed resulting, and of the dissatisfaction of the public with the courts. It is a question which goes to the very foundation of judicial procedure and the practice of law.

This number of the JOURNAL completes its second year. In preceding numbers a considerable range of topics has been considered. There have been articles on the reorganization of city courts and of the courts of an entire state. There have been articles on the organization of the bar, on

specialized branch courts, on conciliation procedure, commercial arbitration, rule-making authority, and so forth. The entire field of judicial administration has by no means been covered. Details of practice have been largely ignored. Little has been said on the great subjects of criminal law enforcement and on the selection and tenure of judges. But it seems timely now to undertake a brief resume of what has been presented. The casual reader is entitled to know whether the scattered topics discussed can be considered as parts of a comprehensive scheme of reform.

To this end some analysis of the entire subject will be useful. It is necessary first to an understanding of the various elements entering into the administration of justice to differentiate between substantive and adjective law. Substantive law is that law which, broadly, creates and defines rights, while adjective law is a convenient designation for all the law which provides means for the defense of these rights. Substantive law may, and often does, result in injustice. But in a study of the administration of justice we must omit from consideration this great background of substantive rights and concern ourselves only with the factors which influence its administration.

These factors may be said, roughly, to embrace: (1) the political machinery of the courts; (2) the judges with their form of selection, salary and tenure; (3) procedure proper, and (4) the bar. Each of these factors may be subdivided indefinitely. Under the division of the "bar" we have, for instance: (a) the education of law students; (b) requirements for admission; (c) organization and machinery for the maintenance of ethical standards.

By keeping the few major divisions in mind it is much easier to locate defects and to assess with some measure of accuracy the relative responsibility.

Court Organization Stressed

The American Judicature Society, without ignoring any part of these factors, has stressed particularly the fundamental machinery of court organization. This is more a matter of political science than of

law, but our political scientists have shrunk from entering this field and it is still left as virgin territory for the work of the lawyer, who is better qualified to labor therein.

Court organization is a part of the field of judicial administration which is most out of joint with our times. In a hundred years and more we have scarcely altered our scheme of government, considered as practical machinery of administration, except that in the past decade our cities have largely adapted their charter plans to modern needs and have thereby worked out their salvation. There are two principal reasons for the refractory nature of such political machinery as court organization:

1. We are amateurish in political organization, as compared with certain other nations, because we achieved a comparatively successful norm long ago and have had less reason than others to experiment since. And yet, to offset this, is the fact that in industrial and social fields we have no superiors in organization work. In industry the rest of the world goes to school in America.

2. Our court systems are mainly embedded in constitutions which are, at the best, discouragingly hard to alter, and in some instances are almost beyond change. In respect to this difficulty it should be noted that this is the defect of the constitutions, which deal largely in what is not so much principles of government as mere statutory regulation. There is nothing now sought in the field of work undertaken by the American Judicature Society which implies the slightest change in any constitutional theory of administering justice. All the good that a constitution can do for the courts is to protect the judicial department in its essential prerogative of passing upon the constitutionality of acts of the legislature. This is accomplished by placing the supreme appellate court beyond attack from either of the other co-ordinate branches of government. This prerogative can be fully protected and still made a part of a practical machinery of justice.

The defect of court organization generally is that it preserves the extreme decentralization of a pioneer period when judges were so few in numbers that their responsibility was clearly seen and there was no difficulty in co-ordinated work.

Independence Without Eccentricity

The great problem of administering justice under our system of law and government is to preserve the independence of every judge in the essential judicial function and yet to avoid the eccentric or capricious manifestations of individuality which are so likely to result from independence. To accomplish the latter end we provide appeals. But it is notorious that a considerable part of the administration of justice is nothing but administration. Blunders occurring in administration are largely beyond cure through appellate procedure. In the criminal field administration is more than three-fourths of the whole. In the civil field it is at least no negligible part.

Closer co-ordination of judges is the remedy indicated for the avoidance of individual eccentricities. In organization only can we accomplish that standardized administration which is so necessary in a system employing many judges. And we may observe with hopefulness that closer organization does not in any measure intrude upon the independence of the individual judge in the exercise of his essential function of construing and applying the law in each case.

In the administration of justice the state is the unit of administration. The idea of a unified state court, in place of the decentralized and disjunctive system which now prevails in most of the states, is now generally accepted. There may be much disagreement as to the form of organization, but there can be no intelligent controversy over the proposal that all the judges of a state together should be considered as constituting a single judicial machine with a single and indivisible responsibility for administering justice. There are indications that we shall begin wholesome experiments under this principle before long.

The idea of closer organization of the judges of a large city is entirely consonant with the unified court idea. Within the large city the organized co-operation of judges in a single piece of judicial machinery is probably needed more than elsewhere and is also to be more readily made successful.

The proposal for organization is no finely spun theory. The idea did not emerge until after organization to a partial extent in several of our cities showed what could be done. *The only material gains in judicial reform which have been made in a century have been through the organization of some of the judges of certain cities*, and these gains have been made notwithstanding the faulty and partial application of the principle and often the burden of unfit material on the bench.

Why Procedure Fails

In the field of procedure we are not at all amateurish. Nearly seventy years ago we evolved a reformed procedure which was intended to make justice speedy and inexpensive. The reform of the codes accomplished a good deal, but failed also to a considerable extent, and for these reasons:

1. It ignored the organization of judges and courts, which is more fundamental and more conclusive than procedure.

2. It ignored methods of selecting and retiring judges. As a result of these first two defects code pleading was placed in the hands of judges who were wedded to the old and hostile to the spirit and the form of the new.

3. It resulted in time in reliance upon legislatures for improvements in the administration of justice, which relieved the judges of the responsibility which was naturally theirs, and continually made inroads upon their authority, autonomy and independence. It multiplied indefinitely the opportunities for litigation because every section of statutory procedure became pregnant with substantive rights which the courts were bound to protect. It has resulted in making procedure—the mere etiquette of justice, as Dean Pound

has expressed it—a large part of the entire body of litigation.

Under the legislated code (and not even the “common law” states have escaped their thousands of sections of practice rules), litigation has more and more exalted the “sporting” element, has more and more tended to become mechanical, and has more and more subordinated that genuine, practical justice which is implied in justice speedy and cheap.

And so, as a preparation for a consideration of the details of procedure, there has developed—and this JOURNAL has made it a cardinal feature—a demand for the exercise by the courts of their ancient powers of regulating practice and pleadings. Nobody now projects any new court, or system of courts, without presuming that the rule-making power is to be conferred upon its judges.

There is variance of opinion as to the best arrangement for the exercise of the rule-making power but no serious opposition to the intrinsic idea. Where there is no approach to a practical organization scheme there is naturally some hesitation as to the methods for exercising control of procedure (subject to legislative authority). And this shows the intimate relation between organization and procedure.

The Society has been as diligent as circumstances would permit in preparing a system of procedure, which will naturally take the form of a schedule of rules supplementary to a judicature (court organization) act. But this work is now practically completed and will be published as Bulletin XIV within a few weeks at the latest.

Commercial Arbitration

Commercial arbitration is advanced, not in despair of the courts, but as an extension of their work in a particular field under special methods. The English have learned that not even a specialized commercial court can compete successfully with arbitration under the auspices of business organizations with court con-

trol over legal questions. In the determination of questions of fact, arbitration will always necessarily be superior to any formally constituted court, whether or not it employs a jury. The form of arbitration which is being advanced by this Society more closely co-ordinates the work of the arbitrators with the courts by providing that questions of law shall be submitted to a judge by the arbitrator before he makes his award, and is believed to be superior to the English practice in this respect.

Conciliation Procedure

The idea of conciliation of controversies before they develop into legislation has worked successfully in certain other countries for generations. We are just embarking upon this experiment, but have already proved the entire validity of the idea as applied to the lesser civil causes. It is not unlikely that a wider test will be made in the near future.

Bar Organization

With respect to the bar as one of the important factors in administering justice, the Society has published a draft act for incorporating a state bar association with powers of self-government and self-discipline. The bars of the several states are drifting toward closer organization and are groping for powers of self-government. Discussion of the opportunities in this field is likely to accelerate the movement.

The Society has made no study of legal education for the reason that there are other entirely adequate forces operating in this field. The same may be said concerning admission requirements and examinations, except as these matters are related to the functions of a properly organized bar.

Reference to the cumulative index published in this number will enable members to turn to the articles on the subjects above referred to. The Society still has a fair stock of back numbers of the JOURNAL which will be supplied on request.

Rules of Civil Procedure

The work of drafting a schedule of rules to supplement the Society's state-wide judicature act (Bulletin VII-A) has been in progress for several years and is now nearing completion. In March, 1917, the first nineteen articles were published for criticism by the members of the Council. The remaining articles, from twenty to forty-six, have been drafted, and some changes have been made in those first submitted. The entire schedule is to appear as Bulletin XIV.

In order to give all members a sample of the work two articles have been selected for publication in this number of the JOURNAL. They are Article 16—Preliminary Issues of Law—and Article 37—Mode of Trial.

Readers should bear in mind that these rules are offered as provisional rules of court, to stand until the judicial authority finds it desirable to alter or amend them. They are emphatically not intended to form the basis of a statutory revision. They may be enacted in the first instance by a legislature, in which case the act should state that they are to become rules of court, subject to the rule-making power.

Some of the articles are worked out in considerable detail, while others leave details for the local rule-making authority.

As stated in the introduction to Bulletin XIV, the directors of the Society, after working on procedural rules for the past four years, have reached the conclusion that there is no need for the "short practice act," so often referred to, at least when a sufficient judicature act has been adopted.

While these rules are specially adapted to the unified system of courts projected in Bulletin VII-A, the points of actual contact with the organic court system are not numerous, and with comparatively slight alteration the entire schedule can be adapted to the usual system of courts.

The directors expressly disclaim any expectation of inventing a code of pro-

cedure. Until a survey is made few persons realize the wealth of experience available in methods already practiced in the various Anglo-American jurisdictions. It has not been necessary to devise any untried expedient. The work has been largely that of comparison and selection, of sifting, choosing, rejecting and harmonizing.

The work involved in any comprehensive overhauling and remodeling of existing practice is enormous and judges have little time to devote to such an undertaking. This draft is in accord with present efforts to bring about a model code of rules to govern federal court procedure, a movement which promises to reach fruition at an early date and to influence profoundly the trend of procedural reform in the courts of the several states. Without looking forward to absolute uniformity as a goal it is still possible to hold that a most useful purpose may be served by co-operative work on the part of practitioners and judges in all states in the writing of a model schedule of rules.

An effort has been made to make the commentary concise. Citations also have been restricted to typical jurisdictions.* To range far afield in respect to notes or citations would result in a bulkiness which would make criticism more difficult.

The entire schedule comprises forty-six articles. With notes and citations it makes 198 pages. It will be ready for distribution before May 1 and copies will be sent at once to members of the Council. It will be available to all others at the usual price for bulletins—twenty-five cents.

*The citations from codes and practice acts refer to those at present in use in the jurisdictions named. The words "Rodenbeck Act" and "Rodenbeck Rules" refer to the work of the New York Board of Statutory Consolidation, published in 1915 and now before the New York Legislature; for brevity the name of the chairman of the board is used in the citation.

Article 16. Preliminary Issues of Law

Sec. 1. DEFECTS IN FORM. A defect in form shall be remediable upon motion, by an order to amend.

Compare English Order 19, rule 26.

Defect in form: Under Article 18, Section 11, the court has power to disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party.

Upon motion: The procedure for motions is described in Article 19.

Sec. 2. NONJOINER; MISJOINER. Nonjoinder or misjoinder of parties or claims shall be dealt with upon motion, by an order to add, dismiss, substitute, sever or stay.

Dealt with: See Section 6, as to the order that can be made.

Upon motion: See Section 4, as to the time for moving.

Add, dismiss, substitute: See Article 2, Sections 2, 3, 4, 14, 27 and 29, for examples of rules under which these powers can be exercised.

Sever or stay: See note to Article 2, Section 4, and Article 3, Section 2, as to misjoinder.

Sec. 3. OTHER OBJECTIONS. Incapacity of a party, lack of jurisdiction over the person or the subject-matter, venue, service, or other matter of abatement, shall be dealt with by motion to dismiss the action or vacate the service or other proceeding, as the case may be.

Compare Missouri Code, sec. 598; New York Code, sec. 488; California Code, 430; New Jersey Rules 56.

Incapacity: As distinct from right to sue; see Article 15, Section 31.

Lack of jurisdiction: Under Article 9, Section 8, this objection cannot be raised in a pleading, but must be taken by motion under the rules in this Article.

Venue: A motion on this subject could be made in the county to which the defendant wished the action to be transferred, under Article 4, Section 3.

Service: Such as motions under Sections 8 and 10 of Article 7, disputing the truth of proofs of service.

Dismiss, etc.: But under Section 6 the court may make an order other than the one applied for.

Sec. 4. TIME. Any motion under Secs. 2 and 3, except one based upon lack of jurisdiction of the subject-matter, shall, if not made by the notice of defense as provided in Article 8, Sec. 7, be made before answer, or the objection will be waived, unless made at a later time by leave of court.

Compare Missouri Code, sec. 602; Rodenbeck rule 188; English Order 16, rule 12.

Jurisdiction of the subject-matter: This objection cannot be waived by acquiescence or consent, as it vitiates the entire proceeding. In a state-wide court of general jurisdiction, however, the only subject-matters coming under this rule would be those reserved for the exclusive jurisdiction of the federal courts, and those involving a res both out of the state and not represented within it.

Sec. 5. WRITING. Any motion under Secs. 2 or 3 shall except if made at

the trial, be in writing, and shall be supported by affidavit if based upon matter not appearing of record.

At the trial: At that time it could be made orally, under the general provision of Article 19, Section 1.

Sec. 6. ORDER. Upon the hearing of such motion the court may:

- (1) Grant leave to make any amendment appropriate to meet the application; or
- (2) Stay all proceedings pending the determination of the preliminary questions involved; or
- (3) Order the action to proceed, preserving to the applicant the right to raise an objection in law as provided in these rules; or
- (4) Make such other order as may be just.

The court: It is intended that interlocutory motions of this sort should under the draft Judicature Act be heard and disposed of by a master.

(1) **Amendment:** Although the motion may not have asked for such an order; under Article 18, Sections 2 and 11, the court may order any pleading, process or other paper to be amended as may be just.

(2) **Stay all proceedings:** The rules as to appeals will in certain cases permit an appeal from an adverse decision without requiring the defendant to proceed with his defense on the merits.

(3) **Preserving, etc.:** As in a case of non-joinder of some of the obligees in an action on a contract alleged to be joint.

(4) **Such other order:** E. g., denying the motion or dismissing the action.

Sec. 7. OBJECTION IN LAW. Invalidity in law of a claim or defense shall be dealt with by objection in law as provided in these rules.

Compare New York Code, s. 488; New Jersey Rules, 40; Federal Equity Rule 29; California Code, s. 430; Missouri Code, s. 598; Rodenbeck act, s. 27; English Order 25, rule 2.

Invalidity: Under the liberal powers of amendment conferred in Article 18 procedure under this Section will be of value only where the claim or defense objected to cannot truthfully be amended.

Objection in law: This is the substitute for the common law demurrer. It has been considered desirable, in all recent attempts to improve civil procedure, to avoid the name "demurrer" even though retaining in some form, as must of necessity be done, the procedural step of argument on the validity in law of a claim or defense. Such a device frees the new practice from the mass of rules and precedents that accompany the name "demurrer" and makes it possible to alter the manner in which points of law are disposed of. The principal changes that have been made are to permit a party to raise a point of law and to plead at the same time, and to permit the Court to hear the facts before passing on the point of law. Both of these changes are made on the theory that only a small portion of claims or defenses are, in practice, pleaded, which cannot either by amendment or by proof be made "valid in law," and that it is desirable to eliminate lengthy arguments of law early in an action which have no result except an amendment, and which are often repeated after the facts have been heard. The name "objection in law" was chosen here as being shorter than the English "objection in point of law," and more accurate than the new Federal equity "defense in law" (which would not be true where raised by a plaintiff in his reply to a defendant's answer).

Sec. 8. TIME. Such objection in law shall be raised by a defendant:

- (1) In his answer, as provided in Article 9; or
- (2) By motion, after the answer, on leave of court and subject to payment of costs to date; and in either of these cases the objection in law shall be

- heard before the trial, unless the court shall otherwise order; or
- (3) By motion before answer, on leave of court, which shall be heard before further proceeding with the action; but such leave shall not be granted unless in the opinion of the court the objection in law, if sustained, would substantially dispose of the whole action or of any distinct claim.

Compare English Order 25, rule 3.

(1) **In his answer:** This permits a party, in effect, to answer and demur in the same pleading.

(2) **After the answer:** A party who waited until the actual trial to raise the point of law would have to obtain leave of court under this section.

Payment of costs: To provide an incentive for raising questions of sufficiency early in the action.

Heard before the trial: Local rules as to time and manner of setting down points of law for argument are not interfered with.

Otherwise order: In some jurisdictions the practice prevails of postponing arguments of law until the facts have been tried, as it is found that in many cases the facts either do not bear out the pleading objected to, or they are such as to allow a defective pleading to be cured by amendment.

(3) **Before answer:** Leave of court is required in this case to prevent a party from interposing an objection in law chiefly for purposes of delay.

Substantially dispose: I. e., where the pleading objected to cannot be cured by amendment.

Sec. 9. SAME. Any objection in law arising upon any pleading other than the complaint may be raised by the adverse party in, before, or after his pleading in response, under the same conditions.

Pleading in response: Under Article 11, Section 7, no pleading after a reply may be delivered without an order of court, so that leave would have to be obtained before filing a pleading containing an objection in law to the reply.

Sec. 10. ORDER. At the hearing of an objection in law the court may:

- (1) Grant leave to make such amendment (subject to Article 18 of these rules) as may be just; but the party to whom such leave is granted may, instead of amending, elect to have final judgment entered against him; or
- (2) Order that the action proceed to trial, with the question of law reserved; or
- (3) Order that the action be dismissed or the pleading objected to struck out, with leave to appeal therefrom and without entering final judgment, the proceedings being stayed until the appeal is determined; or
- (4) Enter such judgment as may be just.

(1) **Amendment:** Under the liberal powers of amendment in these rules, this will be the order most frequently made. The court might make it without the request of the party.

Instead of amending: A party may feel he has made out a good claim, or may wish to obtain the opinion of the higher court upon the question involved.

(2) **Proceed to trial:** See note "otherwise order," under Section 8.

(3) **Leave to appeal:** This subsection accomplishes two purposes. First it makes leave of court a prerequisite to the appeal, thus preventing abuse of the privilege of appeal from an interlocutory order. Second, it removes the speculative element from the appeal as now allowed, because it makes possible the determination of a point of law which may possibly decide the whole litigation, without requiring a party to risk his whole case on that one point.

Sec. 11. STRIKING OUT. The court may at any stage of a proceeding, order to be struck out or amended any matter in any pleading or affidavit which is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action.

Compare New Jersey Rules 39; Federal Equity Rule 21; English Order 19, rule 27; Ontario Rule 137.

Sec. 12. SHAM PLEA. The court may at any stage of a proceeding order to be struck out or amended any matter which is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action.

Compare New York Code, sec. 538; California Code, sec. 453; Missouri Code, sec. 611; Rodenbeck rule 170; English Order 25, rule 4; Ontario Rule 124.

Struck out: This is a different situation from the one calling for an objection under the previous sections, and only an extreme case can be treated in this manner.

Sec. 13. ADMISSIONS. At any stage of an action where admissions of fact have clearly been made upon the pleadings or otherwise, the court may, upon motion in writing by the party thereto entitled, enter such judgment or make such order upon such admissions as may be just, without waiting for the determination of any other question between the parties.

Compare New York Code, s. 511, 547; English Order 32; rule 6; Ontario Rule 222.

Clearly been made: Under Article 9, Section 3, if the answer is limited to a part of the complaint, judgment may be obtained upon the part not covered. This section provides for cases where an answer or other pleading, though complete, makes admissions upon which a judgment or other order might justly be entered.

Article 37. Mode of Trial

Sec. 1. CLEARING ISSUES. At any stage of a trial the court may require counsel to state orally what matters are not actually disputed, and may proceed:

- (1) by deciding any question of law arising on admitted facts, or
- (2) by framing an issue upon facts in dispute.

Compare New York Code, s. 977, 980; Rodenbeck rules 240, 260; English rules, Order 33, rule 1; Order 34, rule 2.

Conduct: The subjects of impanelling a jury, order of presentation, etc., are not covered in these rules because of the great diversity in local practice and the absence of serious dissatisfaction.

(1) **by deciding:** This is a new provision intended to give the court a summary power to expedite the trial where it is able to see through the pleadings to a real question in issue which is not being brought out by counsel.

(2) **framing an issue:** The right of jury trial is not affected by this clause, as it merely gives the court power to frame an issue at the trial similar to issues framed by the parties under Article 31, Section 6.

Sec. 2. VIEW BY COURT. Any judge or court before whom any issue or matter may be heard or tried with or without a jury, or before whom any issue or matter may be brought by way of appeal, may inspect any property or thing concerning which any question may arise therein, either in or out of court.

Compare Ontario Rule 265; English Rules, Order 50, rule 4.

any judge: This gives the judge the same power of view at present possessed by the jury. It is not a common provision for the judge to have the authority to view premises outside of court. There seems to be some doubt at present about the propriety or right of a judge to go outside the court for view.

by way of appeal: There is at present no provision expressly authorizing this, but the power is probably inherent.

Sec. 3. VIEW BY JURY. The court may permit the inspection by a jury by whom any issue is being tried, of any property or thing concerning which questions may arise at the trial, and for that purpose may make such orders as may be necessary to procure the attendance of the jury at such time and place outside the court and in such manner as may be proper.

Compare California Code, s. 610; Kansas Code, s. 286; Indiana Code, s. 564; Ontario Rules 267; English Rules, Order 50, rule 5.

may permit: This is the provision for view by a jury which exists in some form in the practice of every state.

such orders: The details are best left to the court's discretion in each case.

Sec. 4. DIRECTED VERDICT. At the close of the plaintiff's case the defendant, and at the close of the defendant's case the plaintiff, and, at the close of all the evidence, either party may move for a directed verdict, and where the evidence, with all the inferences arising therefrom, is such that the jury could not reasonably find in any other way, the court shall direct a verdict accordingly. A motion by both sides to direct a verdict shall not operate to discharge the jury but shall be ruled on separately. A denial of such motion by the court shall not be reviewable on appeal unless the motion is renewed at the close of all the evidence, but such denial may nevertheless be considered upon a motion for a new trial.

Compare Rodenbeck Act, s. 37.

could not reasonably: This is phrased to exclude the scintilla rule in accord with the practice in most jurisdictions. It also excludes the practice which exists in a few jurisdictions of directing a verdict on conflicting evidence where the court would set a different verdict aside. Theoretically, the direction of a verdict in such cases would be more correct, but it is common practice in conduct of trials to leave cases to the jury on the chance the jury will find so as not to require the setting aside of the verdict.

motion by both: This sentence is expressly intended to negative the New York practice, which has become a mere catch. It is not true that there is nothing in dispute merely because both sides move for a directed verdict. See *Empire State Cattle Co. vs. Santa Fe*, 210 U. S. 1.

motion is renewed: This is the prevailing rule in the American practice.

be considered: On motion for a new trial the trial judge may correct his error, even though it is technically not available for an appellate court.

Sec. 5. REQUESTS. At the conclusion of the evidence counsel may, before argument, orally present to the judge the following requests:

- (a) in a trial with a jury.
 - (1) for specific instruction to the jury upon the law, the draft of which must be in writing; and, in addition, where other than a general verdict only is desired,
 - (2) for a special verdict by the jury; or
 - (3) for special findings of fact by the jury in answer to special interrogatories, which must be formulated in writing;
- (b) in a trial without a jury, where the right of trial by jury existed,
 - (1) for declarations of the law applicable to the case, the draft of which must be in writing; and, in addition,

- (2) for special findings of all the facts; or
- (3) for special findings of fact by the jury in answer to special interrogatories, which must be formulated in writing;

Compare New York Code, s. 1187; Rodenbeck Act, s. 40; Rodenbeck rules 261; Missouri code, s. 1987; California Code, s. 624-5; Kansas Code, s. 285; Indiana Code, s. 559, 571; Connecticut R. S. s. 757.

before argument: The court has power to give leave to receive requests later under its discretion to extend time; but in the usual case the requests are to be submitted before argument to give the judge time to consider them during the arguments of counsel to the jury.

(a) (1) **writing:** This does not refer to the final instruction given by the court, which is covered by Section 7. This provision is for the protection of opposing counsel under Section 6, and to give the judge a better opportunity to pass on the points raised. The written request makes for accuracy and gives a better opportunity for specific objections to be made.

where other: Because a general verdict will necessarily accompany the special findings of fact in answer to interrogatories, under sub-section (a) (3).

(2) **special verdict:** This clause makes a special verdict a matter of right, whereas it has generally been considered a matter of discretion. What is here intended is the special verdict of common law practice, which is the finding of all the facts, as a connected story, not the common statutory practice of a general verdict and special findings, which is provided for in sub-section (a) (3). By Section 9 of Article 38 on verdicts, such a special verdict must be fairly and reasonably construed, contrary to the former practice of strict construction, which discouraged the use of this form of verdict.

(3) **special findings:** This is a common statutory provision. Its purpose is to prevent the jury from finding an improper general verdict; it affords an indication of the process of reasoning whereby the jury reached a general verdict. It would always be accompanied by a general verdict. The questions are put to be sure the jury does not overlook a specific point emphasized by a party.

(b) **where the right:** In trials where no such right existed, the decisions on both facts and laws are receivable as of course.

(1) **declarations:** These are sometimes called "propositions," but more commonly declarations. They are analogous to instructions in a jury trial, and are for the purpose of preserving the questions of law for review.

(2) **special findings:** These are analogous to a special verdict in a jury trial.

(3) **interrogatories:** These are analogous to special findings by the jury under subsection (a) (3). They supplement the general finding of the court for one party or the other.

Sec. 6. DRAFT. A copy of the draft of such instructions, declarations or interrogatories, shall be submitted to opposing counsel sufficiently early in the trial to enable them to examine the same before the time for objecting to the judge's instructions.

Compare Rodenbeck Act, s. 39; Massachusetts rules 45; Connecticut rules 114.

Sufficiently early: Counsel are entitled to have an opportunity to study the requests made in order to be able to object intelligently to the judge's instructions, under the provisions of Section 12.

Sec. 7. SUMMING UP. In a jury trial, after counsel have completed their arguments the judge may orally sum up the evidence (and may) (but shall not) comment upon it to the jury, and may then instruct the jury orally upon the law applicable to the facts, unless both sides request such instruction to be written.

may orally: It has always been discretionary with the court even where it has the power. It is not under any circumstances obligatory to sum up evidence to the jury.

sum up: In some states the judge is not permitted to do this. In about half he is. The Directors favor the power to sum up because they believe that the jury after hearing counsel have a confused notion of the evidence, and the judge should at least recall to them what the evidence was, with the weight of an impartial review.

comment: The directors leave the prohibition upon comment in the alternative, although the board is unanimous in its own approval of the power to comment. The alternatives are left in the section because of the irreconcilable differences of opinion existing in the various jurisdictions. The strongest reason why the court should have power to comment is that it should be able to correct fallacious argument by counsel.

the jury orally: The reasons are sufficiently obvious. Under the practice in many jurisdictions, the jury are confused by a mass of written instructions so framed as to be difficult to understand. The written instruction also imposes great labor on the judge, as if he strikes out on an original line he must formulate the instruction in writing himself; the practical result is that the trial judge is likely to accept without change written instructions as framed by counsel, which are frequently drawn to test the judge's knowledge of the law, rather than to aid the jury in deciding facts. Indeed the practice of writing of instructions has developed a new art of special pleading. It is largely used to get errors in the record. Apart from this there is the advantage of direct discourse to the jury in an oral instruction, and the ability of the judge to make explanations which are valuable.

unless both sides: It is fair to grant a written instruction if both sides unite in asking it. This might also be a protection if both sides lacked full confidence in the ability of the judge to frame a correct oral charge under the circumstances.

Sec. 8. DECLARATIONS. In a trial without a jury, after counsel have completed their arguments, the judge, in addition to making specific declarations of law as requested, or in lieu of any or all of those requested, may make oral declarations of the law applicable to the facts.

In addition: If the judge accepts requests made he marks them as provided in Section 9; if he rejects them this gives him an opportunity to indicate his view of the law without modifying and tinkering with the written requests.

oral: No writing is necessary in these cases, as the stenographer takes down the judge's words.

Sec. 9. REFUSAL. In either case he shall state which, if any, of the requests for instructions or declarations presented, if any, he refuses and shall mark each "Given," or "Refused," as the case may be.

Compare Rodenbeck rules 261; Indiana Code, s. 559.

shall mark: The requests then become part of the record with the judge's notation as made.

Sec. 10. DIRECTIONS. The judge shall in his discretion direct the jury

- (a) to pronounce generally upon all of the issues, or separately on specific issues, in favor of either the plaintiff or the defendant; or
- (b) to find a special verdict upon all the facts as established by the evidence, stating such facts without the evidence, so that nothing remains to the judge but to apply the law; or
- (c) to return special findings of fact in answer to written interrogatories, together with a general verdict.

Compare Rodenbeck Act, s. 33; Rodenbeck rules 281; Missouri Code, s. 1983-90; California Code, s. 608-9; Indiana Code, s. 559; New Jersey rules 110; Connecticut R. S., s. 753.

all the issues: This is the ordinary general verdict.

specific issues: The jury is asked to say yes or no to certain questions. This is not a special verdict. See note to Section 5. It is appropriate where the court separates the issues in a case.

Sec. 11. EXCEPTIONS. It shall not be necessary to take formal exception at any time in the course of a trial. Requests or objections properly made shall be sufficient to preserve a question for review.

Compare New York Code, s. 992; Rodenbeck Act, s. 35; Rodenbeck rules 287; Massachusetts rules 46; California Code, s. 646, 648; Indiana Code, s. 561, 658; Connecticut rules 74.

exception: The exception has become a pure formality. When a distinct ruling has been made on a question of law, there is sufficient matter upon which to base a review. The exception adds nothing to the objection, in particularizing the ground for complaint.

Sec. 12. CHARGE. In a jury trial either party may, before the jury retire, object to any portion of the judge's instructions, and request a modification or withdrawal of such portion. In the absence of such objection a party shall be deemed to have waived any right to raise such objection on appeal. On appeal objections to the judge's instructions shall be limited to those so raised.

Compare New York Code, s. 995; Indiana Code, s. 560; Connecticut rules 115.

modification: This is the present federal practice. It is a matter of fairness to allow the judge to correct an error which might have escaped his attention. This section makes the right clear and avoids some errors which subsequently might appear.

waived: This puts a compulsion upon fair efforts by counsel to correct errors in the instruction without delay.

Sec. 13. WAIVER. Failure to object to the judge's instructions shall not, however, be deemed to waive any right to appeal on the ground of his failure or refusal to require a verdict in the form requested.

shall not: This preserves the right of review on a fundamental ground without the necessity for formal objection.

For Majority Verdicts

One might think that the writer is firmly of the opinion that a jury trial is infallible. I do not think so. I believe justice would be better served by a jury of three or five judges, sitting in banc for the trial of all classes of legal actions, criminal or civil, and that the many times farce of trial by jury should be abolished. It is, however, made a farce many times out of ten by the act of the thirteenth juror. That juries do err, and make grievous mistakes, and give some marvelous and wonderful verdicts, cannot be denied, but they are no more given to error than the one—the thirteenth juror, as the vast number of reported cases in the appellate courts will prove. . . . The thirteenth juror is the controlling verdict-maker. Not alone is the thirteenth

juror the controlling dictator, for when the verdict goes up on appeal his verdict is often defeated by the appellate court, who may all concur, or may render a Scotch judgment,—a majority verdict, and just here we may ask, Why should we not have Scotch verdicts *ab initio* from our juries? How often we see cases reported where seven, nine, and eleven jurors have agreed. The majority judgment would save a vast amount of expense to the state in criminal trials and the contestants in civil suits.

Thousands of cases at law are decided in the appellate court even up to the United States Supreme Court by a majority verdict, and such verdicts are based on law and evidence presented.—*Willis Barnes in Case and Comment, Vol. XXIV, No. 10, p. 807.*

Short Cuts in Procedure Accomplished by Agreement

I.

In the case of Chicago Savings Bank and Trust Company against the Nebraska Electric Company in the United States District Court at Omaha, heard by B. H. Dunham, Master in Chancery and Judge Woodrough, a bill was filed to foreclose the trust deed on electric light plants securing numerous bonds. Certain creditors filed intervening petitions claiming a priority lien in equity on the ground that there had been a diversion of income and that the materials furnished by the creditors were for current operating expenses, and also that the after-acquired property clause of the mortgage was invalid and that after-acquired property was not subject to the mortgage. The determination of the issues of fact raised by the intervening petitions involved an elaborate investigation of what property was after-acquired, what materials the interveners had furnished, what they had been used for, and a general examination of the accounts of the defendant corporation to ascertain whether there had been any diversion of income.

It was apparent to both parties that this would involve a prolonged hearing before the master, the examination of a great many books and the calling of a good many witnesses. For the purpose of saving the expense of such a hearing and also the time which would be consumed, all parties in interest stipulated that a certain expert accountant, in whose integrity and fairness both sides had confidence, should make an investigation from the books and records of the corporation and from such *ex parte* statements of officers and employees of the corporation as he should deem necessary in order to ascertain the facts on the issues involved. These were as precisely set forth in the stipulation as was possible. It was further stipulated that the report brought in by the accountant should be received in evi-

dence under the stipulation, provided that the accountant himself and all persons from whom he derived any information should present themselves and be subject to cross-examination by all parties to the litigation. The stipulation also provided for the payment of the expense of this investigation by the parties to it.

The plan worked to the satisfaction of all parties concerned. The accountant made his investigation and upon the hearing the accountant's report was introduced in evidence and the accountant was cross-examined by the parties on both sides, and then the two operating officers from whom he had derived information and who gave such information as of their own knowledge were placed upon the stand and cross-examined by the parties in interest. This procedure required only three days before the Master as against what all agreed would have been three or four weeks before the master had not this method of procedure been adopted. The right of cross-examination by both sides was ample protection to elicit explanations and modifications, so that the actual facts of the situation were obtained to the satisfaction of all concerned.

II.

In the same case the entire hearing on all the issues on amended petitions of intervention required some four weeks and at least 2,000 pages of testimony was taken before the master presented by depositions, and there were approximately 200 exhibits, many of them lengthy. In the ordinary course the argument at the close of the evidence would have consumed before the master five or six days. The master would then have considered the evidence and the arguments and made his report after which objections would have been taken to the master's report, considered by him and sustained or overruled. If sustained the matter would then have

gone before the judge on exceptions to the master's report, and the burden would have been placed upon him of considering in some manner the bulky record and hearing the arguments over again in large part at least in order to come to a conclusion. Again in order to save time and expense and shorten up the hearing it was proposed to the judge that he sit with the master in the hearing of the final arguments upon all the evidence taken before the master. To this request the judge acceded, and when the time came for the final arguments, the judge and the master sat together during a five-day argument. The judge in this way not only heard a complete review of the law and the evidence by counsel at the same time with the master, but through conferring with the master he was able to make a satisfactory check on statements of counsel regarding the evidence and to read for himself such important parts of the evidence as seemed necessary.

The result was that when the master's report was handed down it was accompanied by an opinion of the court dealing with his approval or disapproval of the findings of the master, and the argument of objections and exceptions was entirely in the nature of a motion for a rehearing at the conclusion of which the decree was entered as indicated by the Court. A saving of time and expense to all parties including the judge by this simple method of procedure amounted to a very considerable number of days besides enabling counsel to present the whole matter before the master and the judge while the evidence was fresh in the minds of all who had taken part in the hearing.

III.

In the case of *Bacon vs. Bank of Montreal* pending in the Circuit Court of Cook county, Chicago, Bacon sued the bank for paying out money on forged checks. The defense on the facts was that the plaintiff had left checks signed in blank with his confidential clerk, who had used such checks fraudulently by filling in such amounts as he wished to draw, securing

the money and appropriating it to his own uses. After an expensive trial lasting over three weeks the jury brought in a verdict for the defendant. The court, however announced his determination at a subsequent date to grant a new trial, because in his opinion the verdict was manifestly against the weight of the evidence. In other words, he became convinced that upon the record as made a verdict should have been directed for the plaintiff.

Both parties were anxious to avoid the expense of a new trial. Counsel for the plaintiff apparently felt that upon the same evidence the jury would bring in the same verdict. To counsel for the defendant it was obvious that if the court deemed it proper to take the case from the jury it was useless to go through a new trial just to secure such a ruling.

The parties therefore stipulated that at the expense of each the record of the former trial should be written up exactly as it occurred with all the rulings of the court on the evidence; that when so written up it should be introduced upon the new trial as the sole and only evidence in the case, each party being in the same position with regard to the presentation of evidence and objections as appeared in the transcript and the rulings of the court to be the same. Then it was provided that if the court should direct a verdict for the plaintiff and if the defendant should take up on appeal the judgment entered pursuant to such direction and should reverse the same on the ground that there was sufficient evidence to go to the jury, then by the agreement of the parties either in the Appellate Court if that were possible or if not upon the remanding of the case to the trial court for a new trial, judgment was to be entered for the defendant.

There were other provisions of the stipulation which were necessary for the particular case, but the above was the essential principle of it. It will be noticed that the parties could not consent that the judge should direct a verdict for the plaintiff because that would cut off the right of appeal, so the stipulation was simply

worded that if he did so and a judgment was entered and appealed from and reversed the judgment for the defendant by agreement should be entered. It will be observed also that this scheme accomplished precisely what was accomplished under the English practice of taking a verdict of a jury subject to the opinion of the court *en banc* or subject to a rule nisi that the verdict was to stand unless cause were shown why it should not be set aside and judgment entered for the other party.

The above short cuts are suggested for the consideration of lawyers because they have been worked out practically and put into operation under my observation and have operated admirably. The fact is that many such short cuts in expediting the litigation can be arranged if counsel are disposed to do so and have enough confidence in their views not to be frightened at what appears at first to be somewhat of a novelty.

—Albert Kales.

Pensions for Federal Judges

The editor of the Central Law Journal¹ comments upon two obvious needs of the federal judiciary. One is for higher salaries and the other for an old age retirement plan. There is now a bill in Congress providing for an increase of the salaries of District Court judges to \$7,500 and of Circuit judges to \$8,500, which has been passed by the House.²

In some of our larger cities federal court judges are paid only half as much as local judges. We do not say that they should receive as much, because they are free from election expenses and have security of tenure. But they should receive enough to permit them to live in a dignified manner and to save something, nor is it a valid argument against higher salaries that it is possible to secure the services of good judges under the present rate of pay.

But our legislators continually ignore

the obvious fact that there is a great difference in localities. In most places where federal judges live \$6,000 is ample pay. Congress appears to lack that degree of legislative proficiency which would enable it to make this simple distinction between judges in small cities and those in large ones. If the present bill is defeated it will undoubtedly be due to this fact and there is even reason for holding that it should be defeated for this reason.

A system of life tenure without a practical retirement provision is equally amateurish. The editor of Case and Comment suggests that the president should be empowered to retire judges who have reached the age of seventy and are physically unfit. We are proposing now to empower the United States Supreme court to make rules of practice and procedure for the federal trial courts. The idea of conferring rule-making authority on the courts generally is recognized as the right way out of the procedural morass. If courts are to be trusted to perform this important function (and what power can do it better?) why should they not also possess sufficient "local self-government" to control the matter of retirements?

That evil frequently results from our present unregulated system, and that it is always potential cannot be denied. The judge whose powers are waning is the least dependable person to determine when retirement should come. As a legislative problem this is not quite so easy as the matter of adapting salaries to the scale of living in various localities, but the principles involved are simple and it takes but little ingenuity to apply them. Compulsory retirement should not depend upon age at all, but upon fitness. The amount of the retirement pension should depend upon the number of years of service. The decision should be made by the judge's own colleagues, who can best be trusted to know all the facts and to act justly both to the incumbent and to the public. The decision should be made by a properly constituted authority of a court which is sufficiently organized to be able to discharge the necessary administrative

¹Vol. 23, No. 4, p. 61.

²According to newspaper reports, the bill has become a law and a roundabout means is provided for inducing superannuated judges to retire.

duties of the court in a responsible manner.

A defect in judicial administration has to become conspicuous before a legislature can be moved to act. After tedious delays the situation is often dealt with in a clumsy manner. Less conspicuous matters are often without remedy.

Congress and all of the state legislatures are constantly widening the scope of their activities. This is inevitable and it provides another reason for requiring the courts to take the initiative in making rules and in administering the details of their business.

The state-wide judicature act in Bulletin VII-A of this Society contains a provision on retirement and pensions which suggests the ease with which the matter can be controlled in an organized

court. The act says (sec. 148) that each judge and master of the Superior Court division "upon having served at least ten years and having reached the age of sixty-five years, shall be entitled to retire upon half pay during the remainder of his life.

"Each judge and Master upon having served twenty years and having reached the age of seventy years, shall be entitled to retire upon full pay for the remainder of his life. [This furnishes sufficient incentive for the incumbent to work until seventy years of age.]

"Provided, however, that any judge or master who shall be entitled to retire upon half pay or full pay (except justices of the Supreme Court division) may be so retired by the Judicial Council upon the request of the Chief Justice for the good of the service."

Act Conferring Rule-Making Authority

As the principle of regulating procedure through the rule-making power of the courts gains ground throughout the country there appears need for a concise and comprehensive draft act on this subject. In recognition of this need the following bill was drafted and has been introduced in the Illinois legislature as an alternative to be pressed in case the legislature refuses to enact practice acts containing rule-making authority introduced on behalf of the Illinois State Bar Association.

ILLINOIS.—Proposed act confirming the rule-making power in the Supreme Court.

Section 1. The Supreme Court shall have power, and it shall be its duty:

1. To prescribe rules of civil practice and procedure in the appellate and trial courts of record of the State.

2. To prescribe forms applicable to such rules.

3. To prescribe generally by rules of court the duties and jurisdiction of masters in chancery.

4. To make rules and regulations:

(a) For regulating the terms, sittings and vacations of the appellate and trial courts of record of the State.

(b) For regulating the duties and mode of conducting the business of the clerks and other officers of such courts.

Section 2. Any rule adopted by the Supreme Court may be altered from time to time, or rescinded, in such manner as the court may deem proper. Rules shall be adopted and promulgated in such manner, and shall take effect at such time, as the court may deem expedient.

Section 3. The existing rules regulating the practice and procedure in the appellate and trial courts of record of this State, whether the same be effective by reason of any or all acts of the General Assembly or otherwise, are hereby repealed as statutes, and are by this act constituted and declared to be operative as rules of court regulating the practice and procedure in the appropriate courts, but subject to the power of the Supreme Court herein conferred by this act to make, alter and rescind all such rules.

Note—The intention must be to confer plenary power over procedural rules and to direct the Supreme Court to assume full responsibility. The legislature cannot divest itself of this rule-making power, incidental to true legislative power. Subsequent to the passage of this act the legislature can make any enactment it may consider proper with respect to practice and procedure, and may so annul any rule adopted and established by the Supreme Court.

A common practice is to confirm the

rule-making power in a body of judges and provide that the rules established under this power shall supercede any existing statutes. This has serious theoretical objections, viz.:

1. It makes practice comprise three distinct categories: a. the former statutes; b. the new rules; and c. such subsequent statutes as may be enacted.

2. If a subsequent enactment by the legislature annuls a rule of court, the the court possesses power, apparently, to make another rule, or establish the annulled rule, to supercede the statute. This is an anomaly, not likely to occur, but one which should be rendered impossible. Controversy between the legislature and the courts would be likely to result in the precipitate repeal of the act confirming rule-making powers, possibly depriving the courts of the small measure of rule-making which has always been invoked, and with much need.

By repealing the existing statutes covering the entire field of procedure, there remains at the outset a clear field for the courts. The repealed statutes stand as the first rules of court. They can be altered, modified and welded into a consistent scheme part by part as the need arises. Changes in the practice will be at a minimum at all times and at the beginning of the new regime the legal profession is not confronted by any innovations whatsoever. The old practice is simply left with all its usefulness but subject to that sympathetic interpretation which makes one of the strongest arguments in favor of the principle of the rule-making power. Henceforth there will be only one category of rules and less invitation to the legislature to interfere in this field. And yet the legislature is not divested of any power, but can enact rules if, in its opinion, the judges are not wisely exercising the rule-making power. Under such a status the parliament of Ontario has not dabbled in procedural legislation at all in a period of thirty-six years, during which time the judges have, of their own initiative, twice accomplished a general revision of rules.

It may be felt that for the supreme court to make rules "for regulating the terms, sittings and vacations of the . . . trial courts of record of the state" would impose upon the reasonable autonomy of these courts with reference to minor points of administration, in which case the exception could be added that the rules so made should not interfere with the trial court's right to make rules for the orderly disposition of its business.

The text of similar acts is given below:

ILLINOIS.—51st General Assembly. Senate Bill No. 16.

Section 85. Supreme Court to adopt rules. The Supreme Court shall have power and it shall be its duty, to adopt and put into effect rules regulating the practice and procedure of courts of record of original jurisdiction in all actions at law, as well as in all special statutory proceedings, other than rules applicable to changes of venue, which may not conflict in any matter of substance with the provisions of this act. Such rules shall be adopted and promulgated in such manner, and shall take effect at such time, as the court may deem expedient. Any rule adopted by the Supreme Court may be rescinded, altered or amended from time to time, in such manner as the court may deem proper.

Section 86. Supreme Court to prescribe forms. It shall be the duty of the Supreme Court, prior to the first day of August, 1920, to prescribe and cause to be printed and published, suitable forms of pleadings, process, notices, affidavits and all other paper which may be used in the prosecution or defense of actions regulated by this act, or by the rules of the Supreme Court adopted in pursuance of this act, which forms shall be as brief and concise as may be practicable, omitting all unnecessary verbiage, and the forms so prescribed shall be thereafter used in all the courts of this State in all cases in which they may be applicable, and the Supreme Court shall have power to change or modify, from time to time, the forms so prescribed, and to prescribe new forms in addition thereto.

Section 87. Power of other courts to adopt rules—judicial notice. All courts of record of this state shall have power to adopt all such rules regulating the practice and procedure in such courts in all actions at law brought therein, as well as in all special statutory proceedings, other than rules applicable to changes of venue, which may not be inconsistent in any matter of substance

with the provisions of this act, or with the rules which may be adopted by the Supreme Court in pursuance of this act. Such rules may be abrogated by the Supreme Court on its own motion or otherwise. All courts of this state shall take judicial notice of all rules adopted by the Supreme Court or other courts of record in pursuance of this act.

The foregoing sections appear very substantial at first sight, but in reality confer little rule-making power, for the bulk of statutory procedure, amounting to more than 2,500 sections, is left in force except in so far as it is repealed by this new practice act, which is expressly reserved from alteration by the Supreme Court.

ILLINOIS.—Municipal Court of Chicago.

Section 20. That the judges of said Municipal Court shall have power to adopt, in addition to or in lieu of the provisions herein contained prescribing the practice in said Municipal Court or of any portion or portions of said provisions, such rules regulating the practice in said Court as they may deem necessary or expedient for the proper administration of justice therein. The adoption of such rules shall be accomplished by an order signed by a majority of said judges, which order, when made, shall be forthwith spread upon the records of the Municipal Court and shall be printed in pamphlet form at the expense of the city; provided, however, that no such rule or rules so adopted shall be inconsistent with those provided for by this act.

Section 51. That if the method of procedure in any case within the jurisdiction of the Municipal Court is not sufficiently prescribed by this act, or by any rule of court adopted in pursuance hereof, the Court may make such provision for the conducting and disposing of the same as may appear to the court proper for the just determination of the rights of the parties.

COLORADO.—Session Laws, 1913. Chapter 121.

Section 1. The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supercede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute.

Section 2. All acts or parts of acts in conflict herewith are hereby repealed.

AMERICAN BAR ASSOCIATION.—Special Committee on Uniform Judicial Procedure. Sixty-fourth Congress, 1st Session. H. R. 7572.

A bill to authorize the Supreme Court to Prescribe Forms and Rules and Generally to

Regulate Pleading, Procedure and Practice on the Common Law Side of the Federal Courts.

Be it enacted, etc., that the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice and procedure to be used in all sections, motions and proceedings at law of whatever nature by the district courts of the United States and the District of Columbia.

Section 2. That when and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.

NEW JERSEY.—Practice Act, 1912.

Section 33. In addition to the powers given in Sections 253 and 254 of the Practice Act, the Supreme Court shall prescribe rules for that Court and for the Circuit Courts and Courts of Common Pleas to give effect to the provisions of this act and to otherwise simplify judicial procedure. Such rules shall supercede (so far as they conflict with) statutory and common law regulations heretofore existing. Until such rules shall be made, the rules hereto annexed in Schedule "A" shall be deemed to be rules of court, subject to suspension and amendment in any part thereof, by the Court, as experience shall show to be expedient.

MICHIGAN.—Constitution, 1909.

Article VII. Section 5. The Supreme Court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same.

TEXAS.—Constitution, 1875. Amended, 1891.

Article V. Section 25. The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the state, for the government of said court and the other courts of this state, to expedite the dispatch of business therein.

MICHIGAN.—Judicature Act, 1915.

Section 14. The judges of the Supreme Court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record, in the cases not provided for by any statute; and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice.

1. The abolishing of distinctions between

law and equity proceedings, as far as practicable.

2. The abolishing of all fictions and unnecessary process and proceedings.

3. The simplifying and abbreviating of the pleadings and proceedings.

4. The expediting of the decisions of causes.

5. The regulation of costs.

6. The remedying of such abuses and imperfections as may be found to exist in the practice.

7. The abolishing of all unnecessary forms and technicalities in pleading and practice.

8. To effectually prevent the defeat or abatement of any civil suit, *ex contractu*, for either any non-joinder or misjoinder of parties, where the same can be done consistently with justice.

9. To provide for all necessary amendment of process, pleadings or other proceedings in such case, and

10. To provide the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit, and brought in to answer thereto, if within the jurisdiction of the court.

ENGLAND.—Judicature Act, 1875.

Section 17. (part of). The Supreme Court may at any time, with the concurrence of a majority of the judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any rules of court for the time being in force, and have and exercise the same power of making rules of court as is by this section vested in Her Majesty in council on the recommendation of the said judges before the commencement of this Act.

All rules of court made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

Publicity for American Bar Association

The American Bar Association has a committee on Publicity of which Mr. Charles A. Boston, 24 Broad street, New York City, is chairman. The committee has been formulating a plan which contemplates that news of immediate public interest, proper to be transmitted to the daily press, shall be received by the chairman and transmitted to the various press agencies, as heretofore, but this shall be supplemented by systematic efforts to com-

municate generally the news of the Association to the periodical press interested in matters of current opinion, including all law journals, current magazines and daily newspapers.

A tentative mailing list of about 1,030 names has been prepared. After consultation with Judge Bond, chairman of the committee on Publications, Mr. Philip B. Perlman, an assistant attorney general of the state of Maryland, and formerly city editor of the Baltimore Evening Sun, has been engaged to supervise the preparation and mailing of this information. It is hoped that all matters of public interest will thus reach the editorial mind and the interested public and that the influence of the association may be enhanced.

Jargon in Pleadings

The Central Law Journal [vol. 87, No. 13] publishes the following crisp letter from J. H. Rockwell, Esq., Springfield, Ill.:

It was De Quincy, we believe, who wrote of murder as a fine art. The United States, it would seem, treats it as a means of legal acumen. In almost every state in the Union an indictment for murder—or any other indictable offense, for that matter—contains words enough to fill a column of an ordinary sized newspaper, and sounds like the incoherencies of dementia. Here is an example:

"That the said A. B. C. a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said A. B. C. then and there in his right hand had and held, then and there unlawfully, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said D. C., with the intent aforesaid, out of the pistol aforesaid, by the force of the gunpowder aforesaid, by the said A. B. C., with the leaden bullets aforesaid, out of the pistol aforesaid, then and there shoot off and discharged as aforesaid, him, the said D. C., in and upon the upper right side of the back of him, the said D. C., then and there."

The example, it is needless to say, is genuine, and is not quite as meaningless

as it looks. It explains, in part, the theory of justice alluded to above, which turns a murder trial—or the trial of any other weighty cause—into a game of skill between opposing lawyers. The slightest variation from statutory form, loses the game, and no fact is better known than the fact that crimes of the most heinous character, have many times gone unpunished, solely on account of some trivial verbal omission in the indictment.

In Canada they do things differently—and the doing stands very much to their credit. An indictment there, reads like this: "The jury of our lord, the King, presents that A. B. C. on the tenth day of May, One Thousand Nine Hundred and Seventeen, at the city of Winnipeg, in the Province of Manitoba, murdered D. C." Here the procedure concerns itself with the offence, not the possibilities of legal sport.

Promoting Commercial Arbitration

Efforts to promote commercial arbitration are meeting with success in Chicago. The Chicago Association of Commerce has placed the subject foremost in its 1919 reconstruction programme. In New York and in Michigan efforts are being made to revise arbitration laws.

The JOURNAL for August, 1918 (vol. II, No. 2), deals with this subject at length, giving the full text of the Illinois arbitration act and the rules adopted by the Central Committee to Promote Commercial Arbitration. One of the methods adopted by the committee to inform the public concerning arbitration was to circulate among members of trade associations the following compact statement of the subject:

MR. BUSINESS MAN

DO YOU KNOW

that the Arbitration Act of the State of Illinois was so revised by the 1917 Legislature as to make it possible to have your business disputes adjudicated justly and speedily outside of court? Under these circumstances, why waste time, energy and money in court trials? There is a better way; it is known as

COMMERCIAL ARBITRATION

What it is

Commercial arbitration is a modern method for adjudicating the controversies which arise in the course of ordinary business relations; it is accomplished through a business man's court; the findings of the arbitrator have the full force of a court judgment; the proceedings are according to the statute and the regularly adopted rules for arbitration.

What It Is Not

Commercial arbitration must not be confused with the arbitration of labor troubles—of controversies between employers and employees. It is an entirely different thing.

The Reasons For It

There are four principal reasons for adopting commercial arbitration

1. It is quicker than court procedure. Your case never has to wait on a crowded court calendar. It can be disposed of immediately under arrangements convenient to all concerned.
2. It is cheaper than court procedure. Many business disputes are readily determined without employing lawyers. Every step is direct and at a minimum of cost, just like any business undertaking.
3. It provides an expert who has qualified for the case submitted, by long experience in the particular trade involved. No judge and jury can possibly understand the precise nature of many business deals as well as a business man of long training in the particular trades. Instead of ignorance and delay and muddling on the part of untrained jurors commercial arbitration affords for the first time an expert tribunal.
4. It does not result in enmity between the parties, as does the ordinary law suit. On the contrary it permits of continuing the ordinary relations of buyer and seller while and after the difference is being adjudicated.

No Mere Substitute

Commercial arbitration is a modern substitute for court trials, but it does not exist merely because courts are dilatory; its chief claim is that it affords a better, more expert and business-like method and more just results, than regular court trials.

How to Begin

The parties to an arbitration sign an agreement to arbitrate their dispute, after it has begun, or in advance, in accordance with the formal rules adopted by their trade association, or with the rules adopted by the Central Committee to Promote Commercial Arbitration.

The parties then agree upon one arbitrator (or if preferred, upon three) making their selection from a public list of experts in their particular trade, or selecting anybody else, if they wish. The procedure is then in accordance with the formal rules and under the direction of the arbitrator. The proofs are presented and the arbitrator makes his finding of facts, which, upon being filed with a court, constitute a valid judgment, enforceable by the court officers like any judgment.

Points of Law

If there is disagreement as to the law involved, the arbitrator will refer the disputed point to the court (in Chicago, the Municipal Court) for immediate determination, and will be guided by the decision rendered.

Appeals

Under the arbitration law the same opportunity exists for the correction of any error on the part of arbitrator or court by appeal to the Appellate or Supreme Court as in ordinary litigation today.

Who Pays the Costs?

The parties may, in their submission of a controversy, agree upon the amount to be paid the arbitrator. In the absence of agreement the law allows the arbitrator \$3.00 a day, which is to be paid by the party in whose favor the award is made, and subsequently collected with other costs, if any are awarded, from the losing party. Any services rendered by court officials are to be paid for the same as in ordinary suits. This means that adjudication is to be had at cost. There is no incentive to delay and pile up fees and expenses. Witnesses will be heard at convenient times and very expeditiously.

Based on Law

The arbitration act of Illinois was revised by the 1917 legislature at the request of the Chicago Association of Credit Men and is believed now to be the best act of its kind in any state or country. (Laws of Illinois for 1917, page 202.) In no other jurisdiction is there provision for the immediate determination of points of law by a court.

What Court

In agreeing to arbitrate the parties may name any court as the one to which points

of law will be submitted, and if no such choice is made the arbitrator will submit points of law which may arise to the court having jurisdiction over the subject matter. In Chicago the Municipal Court, Circuit, Superior and County Courts will be available for practically all such purposes.

Court and Business World Linked Together

When the Chicago Association of Credit Men organized an Arbitration Bureau and adopted rules the Municipal Court recognized the importance and worth of the movement and adopted a rule (number 35) providing for submission of points of law. When any such point is submitted Chief Justice Olson will forthwith assign for its prompt decision a specially qualified judge. Under this system the business world and the court are linked together for the most expert, just and economical method ever devised for adjudicating commercial disputes. The parties get the best service in ascertaining facts and the best judicial service in deciding points of law. This method frees the court from a kind of work for which it is not, and cannot be, well equipped, and gives it a greater opportunity for accomplishing its own peculiar and necessary work in the community.

Is This an Experiment?

There is practically nothing experimental in this entire program. The submission of commercial disputes to one or three arbitrators, sometimes trade experts, and sometimes commercial lawyers, has been employed very generally for the past fifty years in the greatest commercial centers of the world. Chicago business men engaged in over-seas trade know that arbitrations are the usual practice in London, Liverpool, Hamburg, Berlin, Paris and other cities. In London over 100,000 arbitrations are held every year and the custom has grown until in recent years there are almost no commercial causes in the English courts. This is one reason why English courts keep abreast of their work with so few judges, and one reason for London's supremacy in the world's trade.

Experience in U. S.

Realizing the necessity for freeing commerce from the burdens of court litigation the Chamber of Commerce of the United States recently perfected arrangements for the arbitration of disputes arising between citizens of the United States and citizens of the Argentine Republic and the Chamber of Commerce of the United States and the Chamber of Commerce of Buenos Aires have published their respective lists of arbitrators. The New York Chamber of Commerce is also taking steps to have the New York ar-

bitration act revised and to bring about the general adoption of this modern practice.

What is New Here?

The new feature in the Illinois law is the one which permits of getting a decision on points of law before the award is made. In other states the arbitrator must decide both on law and facts, and then, if he has erred, the court corrects his error later. The Illinois plan is believed to be a step in advance.

Duty of Trade Associations

Encouragement of arbitration is a natural duty of all trade associations on behalf of their members. Aside from the economy and essential justice it makes for friendly relations among the members.

How Associations Can Assist

In every trade association there should be a committee or bureau on arbitration with power to adopt rules and generally to supervise the work. The committee can publish the names of members willing to serve as arbitrators with a statement of the particular lines with which they are specially conversant. The committee can encourage members to include in all contracts between themselves and with their customers clauses providing for the submission of controversies, and assist in selecting arbitrators. The contracts should also provide that arbitration shall be in accordance with the rules of the association in which one, or both of the parties, is a member.

What Has Been Done

The Chicago Association of Credit Men has taken the initiative in securing the new legislation and encouraging arbitration. At a meeting called by the Credit Men it was voted to invite all of the trade associations of Chicago to participate through their secretaries in a league for arbitration to be headed by Chief Justice Harry Olson as chairman. Judge Olson has appointed as an executive committee C. R. Dickerson, secretary of the Chicago Association of Credit Men, Herbert Harley, secretary of the American Judicature Society, and Abram E. Adelman, Esq., of the Chicago Bar, as secretary of the committee.

The Next Step

Every business man should see that the organization of which he is a member gives consideration to this matter as soon as possible.

Further Information

Any person who wishes fuller information concerning the history and success of commercial arbitration may obtain, on application to the American Judicature Society, 31 West Lake street, its Bulletin No. XII, comprising 72 pages.

Judicial Self Government

There is continual agitation for reform in judicial procedure, an agitation so general as to be of itself the strongest evidence of the need of reform. But always in the foreground is the idea that reform is to be effectuated by some form of legal enactment. The judges are considered to be competent and worthy to pass on the most important questions involving human life, liberty and property. Their powers are so broad that only unlimited confidence can justify their bestowal. Yet these same men are apparently considered quite incapable of regulating their own procedure. Legislative assemblies adopt their own rules; executive commissions formulate and alter procedure at their discretion, but the path of the judiciary must be marked out and fenced by a multitude of legal provisions. The very inelasticity of statutory procedure, the impossibility that it can be the best and shortest method of proceeding in every case, is not the least of the ills which need reform. Yet with the unquestioned success of the federal equity and admiralty systems before them, legislators hesitate to give the power to introduce them in other departments of practice and seek instead for some statutory catholicon which will "simplify procedure." And with the regulatory power over the judiciary transferred to that body itself, it might and should be exercised more stringently than in some respects in the past. In the large cities where there are many judges each acting in most particulars independently, there is of necessity much inefficiency and lost motion. No one would think of running a large business without putting some one in authority. Well kept records would show the widest divergence between judges as to the amount of business transacted in a year and the amount of work nullified by reversals. If an employer found the same discrepancy between employees drawing equal salaries he would speedily know the reason for its existence. Courts sit five hours a day and take two months' vacation while the public suffers

a thousand inconveniences because of the delay in getting cases to trial. If a private employer bore the loss there would be overtime work in that department till the calendar was up to date. Further reflection is removing some of the initial prejudice against Dr. Wigmore's "judicial superintendent" and at times there is a temptation to go the doctor one better and advocate giving the superintendent the power to "hire and fire."—*Law Notes*, vol. xxi, p. 108.

Oral Opinions Needed

The opinion in the case of *Jones v. Sheffer*, 77 Ore. 284, to which our attention is called by an Oregon member of the Society, illustrates very pointedly the evils which flow from a rigidly legislated code, and also the saving to be effected by oral opinions in certain instances.

This opinion takes twenty-five pages, but, in the opinion of the learned justices, it did not deserve to be reported. The last paragraph says:

The evidence in this case is voluminous. The controversy hinges upon questions of fact only. The rules applicable to the facts are fundamental, and are as old as equity jurisprudence. It is not necessary to consider or apply any new or debatable legal principles. The discussion of the evidence is of interest to no one except the parties to this litigation. Although the law requires a written opinion, and directs that it be printed, still no useful purpose is subserved by doing so. The writer attempts to express only his own views by pointing to this suit as a concrete illustration of the need for such a change in the law governing this court as will permit oral decisions, after giving notice to the parties, so as to enable them to be present, in all cases where the opinion will not be useful as a precedent.

Overworked courts of review—and which of them are not overworked—should be able to find a considerable source of saving from oral opinions. This is already the case in some jurisdictions and we are likely to hear of greater reliance on this economical method where the statutes and constitution permit it.

Meanwhile judges everywhere should realize that a considerable part of our overgrown mass of legislated procedure represents unwarranted suspicion of the

judiciary. No other officials are expected to perform their work in a straightjacket. When quasi-judicial commissions are created it is common to give them far greater freedom with respect to procedure than is given in most states to judges, and yet, if there could be any virtue in the minutely legislated code, it would apply more strongly to the commissions than to the courts. One reason the commissions have functioned so capably in most instances is that they have had freedom to create their own procedure.

Congress Enacts A. B. A. Bill

Among the bills just signed by the President is one which the American Bar Association has been urging upon Congress for eight years. It enacts for the Federal Courts that "In any case civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." This rule was prescribed by the Supreme Court for practice in courts of equity as long ago as 1912.

Mr. Everett P. Wheeler, chairman of the A. B. A. Committee on Reformed Procedure, deserves great credit for persevering in his efforts to secure this enactment amidst the many discouragements of delay and indifference. Can anything better illustrate the unfitness of Congress to deal with procedural details than the fact that it has taken the American Bar Association eight years to secure passage of this innocent, rational and almost toothless declaration of principle?

Members of the Association who attended the 1916 meeting, held in Chicago, will recall the debate over this measure, and Mr. Elihu Root's blazing eloquence in its defense. His statement, which fairly burned up the opposition, appears in an abridged form at page 45 of the 1916 Report, A. B. A.

The passage of the bill shows that effort is not entirely without avail, even in Congress, and perhaps the bill conferring rule-making powers on the Supreme Court may be enacted in the next session.

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To Promote the Efficient Administration of Justice

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Bulletin IV-A—Second draft of so much of the Metropolitan Court Act as relates to the Selection and Retirement of Judges. This applies in large part to courts outside of large cities. Pp. 127.

Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 94.

Bulletin VI—Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; Local Courts of Limited Jurisdiction (for rural counties), by Herbert Harley. Pp. 68.

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Bulletin X—The Selection, Tenure and Retirement of Judges, by James Parker Hall. Pp. 32.

Bulletin XII—A Report on Commercial Arbitration in England, by Samuel Rosenbaum. Of special interest to commercial lawyers and trade associations. Pp. 72.

Bulletin XIV—Rules of Civil Procedure Supplementary to the State-wide Judicature Act (Bulletin VII-A). Pp. 200.

The Municipal Court of Chicago, historical and descriptive. Pp. 48.

Northwestern University Law School

(UNION COLLEGE OF LAW)

Founded 1859

JOHN H. WIGMORE, Dean

ANNOUNCEMENT

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Increase in Requirements for Admission and Graduation

¶ *Admission:* After September 1st, 1919, students entering for the first time will be required to submit proof of the satisfactory completion of three years of college study.

¶ *Graduation:* Students entering the Law School with a bachelor's degree representing a four-year course in an approved college, may complete the course in three years. For all others, four years of resident study is required.

For Detailed Information Address the

Secretary of the Law School
Northwestern University Building

Cor. Lake and Dearborn Sts.

CHICAGO, ILL.

Important Questions of To-Day

- ¶ Within what period must drafted soldiers be discharged from the service? (Sec. 2044/)
- ¶ For how many months is the President authorized to retain control of the railroads? (Sec. 3115 $\frac{3}{4}$ n)
- ¶ For what period may a discharged soldier be free from payment on his private insurance before his policy lapses? (Sec. 3078 $\frac{1}{4}$ jj)
- ¶ How long after a soldier or sailor is discharged may an action, proceeding, attachment, or execution be stayed? (Sec. 3078 $\frac{1}{4}$ dd)

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